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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

PETER L. SALEMI, *Petitioner,*

v.

DUFFY CONSTRUCTION CORPORATION, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

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(a) the court denied to petitioner the equal protection of law enjoyed by other persons in his contractual relationship to respondent, under the general provisions of law, which, according to the court's decision, prevail in Ohio and, more particularly, under the previous long line of decisions of the court itself; and

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No.

PETER L. SALEMI, *Petitioner,*

v.

DUFFY CONSTRUCTION CORPORATION, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of Ohio, entered in the above-entitled case on July 28, 1965.

OPINIONS BELOW

The opinion of the Supreme Court of Ohio, reversing by four (4) to three (3), the judgment of the Court of Appeals of Ohio, Eighth Appellate District, is reported in 3 Oh. St. 2d 169, 209 N.E. 2d 566 (1965), and printed in Appendix A to this petition, *infra.*

The three (3) separate opinions of the said Court of Appeals, including a dissent by one judge, are reported in 94 Oh. L. Abs. 196, 197 N.E. 2d 397 (1964) and printed in Appendix B to this petition, *infra.*

JURISDICTION

The jurisdiction of this Court is invoked under Title 28, U.S.C. § 1257(3).

QUESTIONS PRESENTED

1. Is the provision in Article I, Section 10 of the Constitution of the United States, which prohibits states from passing laws impairing the obligation of contracts, hereinafter referred to as the Contract Clause, addressed not only to state legislation impairing the obligation of contracts, but also to state judicial decisions impairing such obligations?

2. Is the Contract Clause violated by a decision of a state court construing its own law where the consequence would be to impair the obligations of a contract valid at the time it was made according to the state law as then construed by the state court?

3. Did the Supreme Court of Ohio impair the obligation of the contract rights of petitioner guaranteed by the Contract Clause by changing the court's long line of decisions in force at the time petitioner's contract was formed, according to which decisions a subcontractor, performing under his contract, is a business invitee, and, by such change, relegating petitioner to the status of a licensee and holding that, as such, he was not entitled to the rights enjoyed by a business invitee to recover damages for injuries sustained by the subcontractor as a result of the negligence of the general contractor on the premises?

4. Did the Supreme Court of Ohio impair the obligation of the contract rights of petitioner guaranteed by the Contract Clause by changing prior Ohio law involving an Ohio statute, i.e., Revised Code of Ohio,

Sections 4101.11 and 4101.12, and holding that, although entering the premises in the performance of his subcontract for purposes related thereto, petitioner was not a "frequenter" within the provisions of those Sections?

5. Did the Supreme Court of Ohio deny to petitioner the equal protection of laws guaranteed by Section 1 of Amendment XIV to the Constitution of the United States because:

(a) the court denied to petitioner the equal protection of law enjoyed by other persons in his contractual relationship to respondent under the general provisions of law which, according to the court decision, prevail in Ohio and, more particularly, under the previous long line of decisions of the court itself; and

(b) the court failed to give to petitioner the equal protection of law enjoyed by other persons in his contractual relationship to respondent under the said Ohio statute, Sections 4101.11 and 4101.12?

6. Did the Supreme Court of Ohio deny to petitioner the due process of law guaranteed by the said Section 1 of Amendment XIV to the Constitution of the United States because:

(a) denial by the court to petitioner of the equal protection of laws amounts to a denial of due process; and

(b) non-application by the court to this case of the general provisions of law of contract obligations prevailing in Ohio amounts to a taking by the state, through its judiciary, of the property of petitioner without due process of law?

7. Did the Supreme Court of Ohio, by invading the functions of the jury, deny to petitioner his right,

under Amendment VII to the Constitution of the United States, as well as under the common law, to have a fact tried by a jury, where the question of fact, whether petitioner's visit to the construction site was for a purpose incident to the performance of the subcontract between him and the respondent and for the benefit of respondent, had been submitted as a fact to the jury in view of the existence of probative evidence and where the Supreme Court of Ohio undertook to reweigh the evidence concerning this issue of fact and made a finding contrary to that of the jury on this issue?

8. Should the Chief Justice of the Supreme Court of Ohio have disqualified himself from taking part in the decision of this case?

CONSTITUTION, STATUTES AND RULES INVOLVED

A. Constitution of the United States:

1. Article I, Section 10:

"No State shall . . . pass any . . . Law impairing the Obligation of Contracts. . ."

2. Amendment VII:

"In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

3. Amendment XIV, Section 1:

". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

B. Ohio Revised Code:

1. Section 4101.01:

"As used in sections 4101.01 to 4101.16, inclusive, of the Revised Code:

(A) 'Place of employment' means every place, whether indoors or out, or underground, and the premises appurtenant thereto, where either temporarily or permanently any industry, trade, or business is carried on, or where any process or operation, directly or indirectly related to any industry, trade, or business, is carried on, and where any person is directly or indirectly employed by another for direct or indirect gain or profit, but does not include any place where persons are employed in private domestic service or agricultural pursuits which do not involve the use of mechanical power."

2. Section 4101.01(E):

"'Frequenter' means every person, other than an employee, who may go in or be in a place of employment under circumstances which render him other than a trespasser."

3. Section 4101.11:

"Every employer shall furnish employment which is safe for the employees engaged therein, shall furnish a place of employment which shall be safe for the employees therein *and for frequenters thereof,* shall furnish and use safety devices and safeguards * * * and shall do every other thing reasonably necessary to protect the life, health, safety, and welfare of such employees *and frequenters.*" (Emphasis supplied).

4. Section 4101.12:

"No employer shall require, permit, or suffer any employee to go or be in any employment or

place of employment which is not safe, and no such employer shall fail to furnish, provide, and use safety devices and safeguards, * * * or to adopt and use methods and processes reasonably adequate to render such employment and place of employment safe. No employer shall fail to do every other thing reasonably necessary to protect the life, health, safety, and welfare of such employees *or frequenters.* No such employer *or other person* shall construct, occupy, or maintain any place of employment that is not safe." (Emphasis supplied).

C. Rules of Practice of the Supreme Court of Ohio:

Rule IX

"MOTIONS FOR REHEARING AND ISSUANCE OF MANDATE

Section 1. Motion for Rehearing.

A motion for rehearing shall be filed within ten days after the announcement of the decision. Such motion must be confined strictly to the grounds specified for rehearing and must not constitute a reargument of the case. Notice of such motion shall be served on opposing counsel who shall have five days to file his memorandum contra.

Section 2. Issuance of Mandate.

Ten days after the announcement of a decision on the merits, unless a motion for rehearing is filed, the Clerk shall issue a mandate in conformity to the entry of the Court. If a motion for rehearing is filed and denied, the mandate shall issue at the same time as the decision on the motion for rehearing. No mandate shall issue on denial of appeal or denial of leave to appeal."

HISTORY OF THE CASE

This was an action for personal injuries which resulted in a verdict for plaintiff, petitioner before this Court, in the sum of One Hundred Eighty-five Thousand ($185,000.00) Dollars, and judgment entered thereon in the Court of Common Pleas of Cuyahoga County, against defendant, Duffy Construction Corporation, respondent before this Court. In the Statement of Facts, below, Peter L. Salemi, Plaintiff-Petitioner, will be referred to as Plaintiff, and Duffy Construction Corporation, Defendant-Respondent, will be referred to as Defendant. The judgment was affirmed, by a vote of three (3) to one (1), by the Court of Appeals of Ohio, Cuyahoga County, Eighth District, hereinafter referred to as Court of Appeals. On appeal, the Supreme Court of Ohio reversed, by a vote of four (4) to three (3), the judgment of the Court of Appeals.

STATEMENT OF FACTS

The Contracts

Plaintiff's Exhibit 13 (R. 449) is the sub-contract between plaintiff, sub-contractor for grading and excavating for a construction site, and defendant, general contractor in general control of the premises. It was prepared and drafted by Duffy, and accepted by Salemi. It will be observed that this contract was entered into on September 21, 1956 (R. 449). The completion clause 3(a) of the contract requires that all work shall be completed in accordance with a schedule prepared by Duffy Construction Corporation (R. 450-451). It will be noted also under the completion clause that the following language is contained in the contract (R. 451):

"Time is the *essence of this subcontract,* and the Sub-contractor agrees to furnish labor, materials, equipment, and supplies in such quantities, and work his force such hours as will be necessary to accomplish the completion above agreed to, as amended by the extensions of time granted under this subcontract."

It is true that the contract price was a unit price contract. However, this only tells part of the story, as we shall demonstrate from the record.

The other important contract which ties in with this sub-contract is the guaranteed maximum contract entered into between defendant and General Electric Company (R. 436). This contract between Duffy and General Electric Company also had a completion clause, Article II, requiring that substantial completion of the work shall be accomplished within Three Hundred Thirty (330) days after erection of the structural steel (R. 436). The completion clause of this contract also stated "time is of the essence of this contract" (R. 436). Under the Guaranteed Maximum clause of this contract, Section 4 (R. 440-441), it is provided that "should the cost of the Work, plus the fixed fee be less than the Guaranteed Maximum, the difference representing the savings shall be apportioned Seventy Five Per Cent (75%) to the Owner (General Electric) and Twenty-Five Per Cent (25%) to the Contractor (Duffy) (R. 441).

Further elucidation of work operations being carried out under these contracts is found in the testimony of Francis F. Duffy, President of Duffy Construction Corporation. As explained by Mr. Duffy (R. 46, B. E. 60—B. E. refers to Bill of Exception, submitted to Supreme Court of Ohio) his construction supervisor, Mr.

Olson, was on the premises at that time to maintain close contact with all of the work that the subcontractors were doing. In fact, Duffy kept a separate sheet (Exhibit 9, R. 447) of Salemi's progress because, as stated by Mr. Duffy:

> "Well, we were interested in the amount of equipment that Central Excavating had on the job, due to the fact that winter was not far away and *we wanted to have the work progress so that we could get our foundations in and our steel erected before the very bad weather set in.*" (R. 47, B. E. 62.) (Emphasis supplied).

Mr. Duffy emphasized (R. 47, B. E. 62) that *it was important to get the excavating work out of the way before the winter set in and that time was of the essence.* In fact, as Mr. Duffy stated (R. 48, B. E. 64), Central Excavating, the plaintiff's company, was voluntarily working six (6) days on this job and *that it was for the good of the job, and, therefore good for Duffy Construction Corporation.* Duffy conceded that very little could be done until Central Excavating had finished it work (R. 49, B. E. 65).

The effect of the guaranteed maximum clause in the contract that Duffy had with General Electric, as tied in with this testimony, was explained by the comptroller, Mr. T. S. Gindroz. He specifically testified (R. 306, B. E. 543) that if costs are kept below the guaranteed amount there was a Twenty-Five Per Cent (25%) benefit to Duffy in the savings and that *time was of the essence* in the completion of the contract.

On the same subject matter, the plaintiff himself testified (R. 82, B. E. 128) that the reason he got the contract from Duffy "was that *they expected us to in plain words hit it hard, and that means to get the job*

done in a hurry because they had quite a big job to do and they couldn't do anything unless the excavation was done first, and November was just around the corner, and so was December and so we promised them we would really go at it hard and try to get the job done." (Emphasis supplied). Further (R. 82, B. E. 128) "On this job, which isn't very common, we worked six (6) days a week and we worked *overtime* every day."

Thus, it is apparent from the contracts as understood by the parties, even though Salemi was working on a unit price contract under which his pay was computed by the amount of earth moved, rather than time spent, *he was obligated under the terms of the contract, and under the circumstances under which he was awarded the job, to push the job as hard as possible which was to the direct pecuniary benefit of Duffy* (R. 162, B. E. 253), by giving *Duffy a chance to participate* in the Twenty-Five Per Cent (25%) savings under his Maximum Guarantee contract. It is further apparent, that in order to *fulfill his obligations,* Salemi was actually engaging in *overtime* expense with his labor force which *was to his pecuniary* detriment, but to the pecuniary advantage of Duffy (R. 164, B. E. 256; R. 217-218, B. E. 341-342). These factors are of vital importance when we come to a consideration of the reasons for plaintiff being on the premises at the time and place of the accident, and hence his legal status, which determines the duty owing him by defendant.

The Terrain

The property where the work was in progress lay on the southerly side of Highland Road. Plaintiff's Exhibit 7 gives a clear picture of the layout (R. 445). Mike Fertal, the crane operator who actually dug the

hole into which plaintiff fell, testified that immediately prior to the time the hole was dug he was working for Norton on the sewer lines at a point approximately 450 to 500 feet distant from the existing driveway and up near Highland Road. (R. 252, B. E. 398.) He stated that the *location* of the septic tank hole *was determined* by Kenneth Olson the defendant's job superintendent *by virtue of stakes placed by Olson.* (R. 252, B. E. 398.) After the job, that is, the digging was finished, Olson inspected it with his carpenter rule and said "Perfect. Go on back." (R. 252-253, B. E. 398-399.) Fertal then took his rig back to the spot where he had been working previously and left it there that Saturday night. This testimony of Fertal fortifies plaintiff's position that he had no reason to anticipate any excavation for the sewer trenches near the existing driveway on Sunday, October 7, 1956, the day of the accident, regardless of the presence of the sewer pipe, in the absence of lights or barricades to guard the excavation (R. 179, B. E. 280-281).

Kenneth Olson himself admitted that the existing driveway was then the main traveled route for personnel having occasion to be working in the project (R. 209-210, B. E. 328). He used the existing driveway as a means of operating his own car to get to and from the field office (R. 210, B. E. 329). And as testified by Olson, they did not start to excavate the sewer trench through the existing driveway until the new driveway had progressed in construction to a point where it could be used as the egress route (R. 211, 213, B. E. 331, 333). There is no dispute in the record, but that at the time of this accident, the construction of the new driveway had not progressed to the point where it could be so used. At the time in question, *the exist-*

ing driveway was still being used as the egress and ingress route. This was conceded by Kenneth Olson (R. 216, B. E. 339). It was also conceded by Olson that as the work was progressing, the existing driveway was becoming harder packed down and spreading out, and the ground on each side of the driveway was substantially level with the driveway itself (R. 216, B. E. 339). Further and most important, Kenneth Olson testified that there was no specific location in the plans as to where the septic tank system was supposed to go, but rather it was a matter of choice and primarily his choice (R. 217, B. E. 341). *Olson chose to locate the hole by the existing driveway at a time when he knew the existing driveway was still being used as the main access route to the job* (R. 216, B. E. 339).

As testified to by Mr. Duffy, the elevation of the terrain on both sides of the existing driveway was substantially level with the driveway at least 20 feet on each side (R. 32, B. E. 38). Salemi had nothing whatever to do with the storm sewer system or the construction of the trenches (R. 34, B. E. 41-42). Also, Duffy conceded that the details of the septic tank system and filter bed trench were left to his company's discretion, rather than provided for by the architect or anybody from General Electric (R. 42-43, B. E. 54-56; R. 52, B. E. 79). As to the septic tank system, Olson would merely go to the General Electric field engineer and say, "Here is where I want to put it," and he would say, "Go ahead." (R. 43, B. E. 56.) *Furthermore, Mr. Duffy conceded that on the drawings that Salemi would be working from, he would have no knowledge, either from these, or the contract's specifications, as to where either the field office or the septic*

tank hole was going to be constructed (R. 53, B. E. 81). The grading work for the new driveway was not completed by Salemi's crew until around October 12, and after that, other work had to be done before the new driveway was available as an access route (R. 56-57, B. E. 86-88).

As to the location of the septic tank hole, it is best described by Mr. Duffy who saw it the Monday following the accident, as follows (R. 65, B. E. 99; R. 66, B. E. 101):

> "Q. Now, the model drawing shows that *the easterly edge of the hole is right up against the westerly border of the so called existing driveway.* That's at least what this sketch seems to show. Would you agree with that? (Emphasis supplied).
>
> A. I think *it was fairly close to the edge of the road.*
>
> Q. *Now, actually it was right into the edge of the road, wasn't it, Mr. Duffy?*
>
> A. *It could have been. I couldn't tell you within inches.*" (Emphasis supplied).

Further (R. 66, B. E. 101), Mr. Duffy testified:

> "Q. *Was there anything by way of the terrain to separate the edge of the hole from the roadway?*
>
> A. *After the hole was dug?*
>
> Q. *Yes.*
>
> A. *Not as far as I know.*" (Emphasis supplied).

The Accident

Plaintiff was the only witness to the accident. He testified that he left his home on Sunday, October 7, 1956, a little after 5 o'clock (R. 107, B. E. 166). That it was gray, sort of a dull day (R. 107, B. E. 167). That with reference to the condition of sunset, there

wasn't any sun out that day (R. 107, B. E. 167). That it took him a little over an hour to get to the accident scene (R. 108, B. E. 168). By the time he arrived at the accident scene it was grayer, almost down to dark (R. 108, B. E. 169). The driveway was open so that he could proceed right on into it (R. 109, B. E. 170). He parked his car because he was afraid that it would be wet further in the premises and that he would not be able to turn his car around or back out (R. 109, 110, B. E. 170, 171). *He had been using the lights of his car for driving between the time he left his house and arrived at the accident scene* (R. 110, B. E. 171). There was still enough natural light, although it was very dull, so that he could see where he was walking, and could distinguish lumps of clay and ruts on the ground immediately in front of him as he proceeded (R. 111, B. E. 173). After having walked on the existing driveway, a few hundred feet, all of a sudden he went down into something and didn't know what it was. He did not see the hole at anytime before he fell into it (R. 112, B. E. 174). He was at all times looking where he was walking just before he fell (R. 112, B. E. 174). He *could not* distinguish the hole from the surrounding area because all of the ground looked the same all the way around (R. 112, 113, B. E. 175, 176). The hole, or the space of which the hole consisted, was indistinguishable in appearance from the solid ground on which he had been walking (R. 113, B. E. 176). He fell into the deep hole, that is the septic tank hole, not the filter bed (R. 113, B. E. 176). There was no barricades or lights around the hole into which he fell (R. 114, B. E. 178). He had absolutely no knowledge of the existence of the hole before falling into it (R. 115, B. E. 179).

Plaintiff's Reasons for Going on the Premises

Plaintiff testified that the Saturday before the accident he went to the premises around 1:30 p.m. because "We make *changes* as we progress on the job" (R. 85, B. E. 132, 133). It is necessary to keep in constant touch with the on-the-job foreman for these *changes* (R. 85, B. E. 133). Plaintiff further explained that he was discussing the job with the foreman and "you just can't go along on the *same schedule* all the time." "We were planning what our *next move* was going to be." (R. 99, 100, B. E. 155, 156.) (Emphasis in this paragraph is supplied).

The fundamental problem on Saturday, October 6, was to plan for operations the following Monday (R. 100, B. E. 156). It was also important to find out if the general *contractor's superintendent (Olson)* wanted anything particularly done (R. 100, B. E. 156, 157). When plaintiff left the premises on Saturday afternoon, the backhoe was still up on Highland Road where he had seen it before (R. 100, B. E. 157).

After leaving the job on Saturday, *it rained hard late* Saturday evening and early Sunday morning (R. 101, B. E. 158). It would not be possible to progress *in the manner planned,* especially in certain areas (R. 101, B. E. 158), if the ground *became muddy* and soft. But it was possible *to replan the job* so that the same men and equipment could be used *on other phases* of *the work on Monday* without delay and confusion (R. 102, 103, B. E. 159, 160, 161). It is very common to change previously planned moves because *of rain* (R. 102, 103, B. E. 160, 161), and discuss the matter with the on-the-job foreman *to relocate or change the equipment over to another area on the same job* (R. 103, B. E. 160). *It was not desirable to wait until Monday*

morning to make these on-the-job changes if the job was to run smoothly (R. 104, B. E. 162; R. 159-160, B. E. 249; R. 162, B. E. 253). With bad weather just around the corner, the men were working *overtime* every day and on Saturday, trying to beat the bad weather and keep the job ahead (R. 82, B. E. 129; R. 104, B. E. 162; R. 162, B. E. 252-253). *Weather is one of the biggest factors in the grading and excavation business* (R. 107, B. E. 167).

Kenneth Olson conceded that there are certain phases of the grading and excavation work that cannot be done in heavy mud (R. 234, B. E. 368). *Furthermore, as testified to by Ernest Connerth, an expert witness, called upon rebuttal by plaintiff as an experienced construction superintendent, heavy rain generally does change the course or plan of a grading and excavation job* (R. 369, B. E. 640). *He personally experienced several instances of going on premises to inspect the field after normal construction hours* (R. 369, B. E. 640). *It is thus clear that plaintiff was on the premises pursuant to his sub-contract to keep the job running smoothly, a matter in which Duffy had a vital pecuniary interest* (R. 164, B. E. 256).

REASONS FOR GRANTING THE WRIT

INTRODUCTORY STATEMENT

This case is of great significance because few issues of constitutional law cry out more for re-examination of prior cases by this Court than the issue of whether the Contract Clause prohibits impairment of contracts not only by state legislation but also by state judicial decisions. Because of the importance of the issues in this case, petitioner begs the Court's indulgence for the length of this petition.

The respondent may take the position that this question should be answered in the affirmative in the light of certain cases decided by this Court. *Detroit United Ry. Co.* v. *Michigan,* 242 U.S. 238, 247, 37 S. Ct. 87, 89 (1916), cited cases of this Court in support of its statement:

> "It is true, as this court has many times decided, that the 'contract clause' of the Constitution is not addressed to such impairment of contract obligations, if any, as may arise by mere judicial decisions in the state courts without action by the legislative authority of the state."

For the reasons and cases referred to hereinafter in point I, *infra,* it is respectfully submitted that this Court not only has the right but also the duty to answer this question in the negative. Because of the gross injustice which would otherwise be done in the case *sub judice,* this case presents an appropriate forum for a clear holding that the Contract Clause prohibits impairment of contracts by state judicial decisions.

The gross injustice is apparent when account is taken of the fact that a jury and the trial court have found that, through the negligence of respondent, petitioner has been so seriously injured, that he was awarded $185,000 for his injuries. The jury, the trial judge and the Court of Appeals of Ohio, Eighth Appellate District—hereinafter called Court of Appeals—by a vote of two to one, found that petitioner's contract entitled him to the rights of a business invitee. Holding that he was not an invitee, the four judges of the Supreme Court of Ohio—three judges dissenting—determined that he was not entitled to recover dam-

ages for his injuries because he was a licensee and not an invitee. Assuming that this Court finds that the majority of the Supreme Court of Ohio—hereinafter referred to as the majority—impaired petitioner's contract right (an issue discussed in point III, *infra,* and point IV, *infra*), is this Court without jurisdiction to hold that the "law", as erroneously—if this be the opinion of this Court—determined by the majority, is within the constitutional inhibition of the Contract Clause?

The majority applied common law principles in finding that petitioner, who, as subcontractor, had a contract with respondent, the general contractor, was not a business invitee at the time of his injury due to respondent's negligence on the premises but a licensee and, as such, he was not entitled to the rights enjoyed by a business invitee to recover damages for his injuries. 3 Ohio St. 2d at 172 and *infra,* p. 5a.

The minority of the Supreme Court of Ohio, hereinafter sometimes referred to as the minority, stated that Ohio Revised Code Sections 4101.11 and 4101.12—hereinafter sometimes referred to as 4101.11 and 12 or, because of their provisions regarding "frequenters", the frequenter statute—had abrogated the common law and defined the duty owed by respondent to petitioner by statutory enactment. 3 *ibid.,* at 173 and *infra,* p. 6a.

The majority found the frequenter statute inapplicable while the minority stated that the petitioner had a right to recover not only under that statute, as a "frequenter," but also under the common law, as a business invitee. 3 *ibid.,* at 171, 174 and *infra,* pp. 4a, 8a.

The right of the petitioner to be treated, under the common law, as a business invitee, or, under 4101.11

and 12, as a frequenter, at the time of his injury, has its origin in the subcontract between him and the respondent, hereinafter sometimes referred to as the contract.

As shown in point III, *infra*, petitioner was performing under that contract when he was injured and, under a long line of decisions of the Supreme Court of Ohio in force at the time his contract was made, he had the contract right, as an invitee, to recover damages for his injuries. The law of those decisions being in force at the time of the making of the contract formed impliedly part thereof.

As pointed out in point IV, *infra*, under Ohio law in existence at the time his contract was made, petitioner had also the contract right, as a frequenter under 4101.11 and 12, to recover damages for his injuries. Such law, being in force at the time when the contract was entered into, formed impliedly part thereof.

State courts have a right to decide contract rights "providing that in doing so they deny no Federal right" of the parties, *Sauer* v. *New York*, 206 U.S. 536, 549, 27 S. Ct. 686, 690 (1907). There would, of course, be such a denial if petitioner's constitutional rights under the Contract Clause were violated.

Point II, *infra*, and even certain cases in point I, *infra*, show that such a violation takes place when a later state judicial decision *reverses* previous law and thus, by establishing a different rule of law, impairs rights acquired on the basis of the earlier state law as construed by the state court at the time when the contract was made.

Point III, *infra,* shows that, so far as the common law is concerned, the majority *did reverse* previous law on the basis of which petitioner's contract rights as a business invitee were acquired. And point IV, *infra,* establishes that, so far as 4101.11 and 12 are concerned, the majority also *did reverse* previous law on the basis of which petitioner's contract rights as a frequenter were acquired.

Petitioner cannot, of course, be certain that this Court would agree with him and hold that the majority *reversed* prior Ohio law, as contended in points III, *infra,* and IV, *infra.* Should this Court disagree with petitioner on this point, he respectfully submits that, *even if there had been no reversal of prior Ohio law by the majority, its opinion does constitute an impairment of contract rights protected by the Contract Clause.* Petitioner is aware that, to support this position, he must establish that the Clause prohibits impairment of contract rights not only by state legislation but also by state judicial decision. It is for this reason that petitioner, aware of the fact that this Court does not decide a broader issue when a narrower one is sufficient, begs the indulgence of this Court for submitting to it the issue involved in point I, *infra,* which is broader than that in point II, *infra.* The latter refers to the well-established rule referred to above under which *a reversal of prior law by a state judicial decision impairing contract rights does violence to the said Clause.* Point I, *infra,* shows that a state judicial decision that impairs the obligation of contracts violates the Clause *even if the decision does not reverse prior law.*

Assuming, *arguendo,* that this Court does not agree with petitioner's position in point I, *infra,* it is sub-

mitted that, by its reversal of prior law,—for its reversal of common law, see point III, *infra;* for its reversal of statutory law, i.e. 4101.11 and 12, see point IV, *infra*—the majority impaired unconstitutionally petitioner's contract rights.

It is well settled that a state statute impairing contract rights violates the Contract Clause, *Ogden* v. *Saunders,* 12 Wheat. 213 (1827); *Abilene National Bank* v. *Dolley,* 228 U.S. 1, 33 S. Ct. 409 (1913). And, for the reasons stated in point I, *infra,* it is respectfully submitted that the Clause prohibits impairment of contract rights by state judicial decisions.

I. The Contract Clause prohibits impairment of the obligation of contracts not only by state legislation but also by state judicial decisions.

A. Cases Determined in This Court.

The decision of this Court in the important case of *Gelpcke* v. *Dubuque,* 1 Wall. 175 (1864), on a contract basis is necessarily based on the assumption that a decision of a court may be treated as "a Law impairing the Obligation of Contracts" because the only special jurisdiction of this Court with respect to contracts is that of enforcing the provision of the constitution forbidding states from passing such a law.

In *Gelpcke,* this Court overruled a decision of a *state court* concerning the validity of a municipal bond issue. There had been *no subsequent legislation* which could be said to have impaired the contract. It was a state court's decision that had impaired the contract. This Court held that, where the law, as declared in state court decisions was settled at the time the bonds were issued, they could not thereafter be

invalidated by a state court decision on the basis of a changed interpretation of the state constitution.

The facts were as follows. In 1857, the City of Dubuque, Iowa, pursuant to legislative authorization, issued bonds in aid of a railroad. This action was in accordance with previous decisions of the Iowa Supreme Court. However, in 1862, that court reversed its previous decisions and held that the state constitution prohibited the bond issue in question. An action was brought in the federal district court. The point as to the kind of court from which a contract case comes to this Court will be discussed later, *infra,* p. 28. From the decision of the lower court the case was brought to this Court on a writ of error.

Counsel for Dubuque contended that the Court should follow the latest decisions of the state courts as to the meaning of their constitution. The Court stated: "It cannot be expected, that this court will follow every such oscillation, from whatever cause arising, that may possibly occur. The earlier decisions, we think, are sustained by reason and authority," 1 Wall. at 205. It quoted with approval a statement by it in *Ohio Life Insurance and Trust Co.* v. *Debolt,* 16 How. 416, 432 (1853): "The sound and true rule is, that if a contract, when made, was valid by the laws of the state as then expounded by all the departments of the government, and administered in its courts of justice, *its validity and obligation cannot be impaired by any subsequent* action of legislation, or *decision of its courts altering the construction of the law.*" (Emphasis supplied).

This principle was applied in a case where there was a *change* in the interpretation of the state consti-

tution by a state court. The Court in *Gelpcke* conceded that "It is settled rule of this court in such cases, to follow the decisions of the state courts. But there have been heretofore . . . as doubtless there will be hereafter, many exceptional cases. *We shall never immolate truth, justice, and the law, because a state tribunal has erected the altar and decreed the sacrifice,*" 1 Wall. at 206 (Emphasis supplied).

Gelpcke involved a state court's *reversal* of a previous state decision, an issue which will be discussed in point II, *infra,* but is this Court to "immolate the truth, justice, and the law" in a case in which, even if the element of *reversal* is not present, if it decides that, in a state judicial decision "a state tribunal has erected the altar and decreed the sacrifice"?

In *Gelpcke,* this Court, although indicating approval of the earlier decisions of the state court, refused to discuss the question whether they were correct. It also did not announce any rule which would require compliance with the state court's decisions.

The *Gelpcke* case was the first to announce clearly the rule with reference to contracts made upon the faith of a state judicial decision subsequently *reversed.* This rule applies when there are the following elements in a case: (1) a rule of law established by a state court, (2) formation of contract rights under such law (existing law forming impliedly part of the contract), and (3) a subsequent state judicial decision *reversing* previous law and thus, by establishing a different rule of law, *impairing* contract rights acquired on the basis of the earlier decision. In such a case this Court refuses to follow the later decision which impairs contract rights acquired under an earlier state

decision. The *Gelpcke* rule has been followed since it was announced and is now well established, *Lee County* v. *Rogers,* 7 Wall. 181 (1869); *Douglass* v. *County of Pike,* 101 U.S. 677, 25 L. Ed. 968 (1880); *Green County* v. *Conness,* 109 U.S. 104, 3 S. Ct. 69 (1883); *Los Angeles* v. *Los Angeles Water Company,* 177 U.S. 558, 20 S. Ct. 736 (1900).

The *Gelpcke* case is similar to the case at bar. As it will be seen in point III, *infra,* and point IV, *infra,* in this case there were: (1) A definite rule of law under which a *person having rights under a contract like the one between petitioner and respondent* would have been considered a business invitee under the circumstances of this case; (2) This law, being in existence at the time of the making of the contract, formed part thereof and created contract rights on the basis of the previous decisions of the Ohio court; and (3) The majority, *reversing* prior state decisions, established a different rule of law which impaired the petitioner's contract rights acquired under the earlier state judicial decisions.

In *Butz* v. *Muscatine,* 8 Wall. 575 (1869), the Court pointed out that, according to the rule in *Swift* v. *Tyson,* 16 Pet. 1 (1842), "this court construes all contracts brought before it for consideration, and in doing so its action is independent of that of the state courts, which may have exercised their judgment upon the same subject," and said:

> "The fact that one of the elements in the case is a statute of the state does not affect the legal result. We are of the opinion that under the statutes of Iowa, in force when the contract was made, the relator is entitled to the remedy he asks,

and that *this right can no more be taken away by subsequent judicial decisions than by subsequent legislation.* It is as much within the sphere of our power and duties to protect the contract from the former as from the latter, and we are no more concluded by the one than the other. We cannot in any other way give effect to the contract of the parties as we understand it." 8 Wall. at 584 (Emphasis supplied).

In *Douglass, supra,* the Court stated:

"The true rule is to *give a change of judicial construction* in respect to a statute, *the same effect in its operation on contracts* and existing contract rights *that would be given to a legislative amendment;* that is to say, make it prospective, but not retroactive." 101 U.S. at 687, 25 L. Ed. at 971. (Emphasis supplied).

In *Anderson* v. *Township of Santa Anna,* 116 U.S. 356, 6 S. Ct. 413 (1886), municipal bonds, issued under an Illinois statute, were held to be void by a decision of the state court on the ground that the statute was unconstitutional. This Court held that state judicial decisions prior to the issuance of the bonds had been *reversed* by the later decision and that, therefore, the case was governed by *Gelpcke.* The Court stated:

"It is the settled doctrine of this court that rights accruing under one construction will not be lost merely by a *change of opinion in the state court;* and where such rights have accrued, before the state court has announced its own construction, the federal courts, although leaning to an agreement with the state court, must determine the question upon their own independent judgment." 116 U.S. at 366, 6 S. Ct. at 418. (Emphasis supplied).

In *Folsom* v. *Township Ninety-six,* 159 U.S. 611, 16 S. Ct. 174 (1895), a South Carolina court held that a state law violated the state constitution. This Court arrived at the opposite conclusion and sustained the validity of bonds which the state court's decision held to be unconstitutional. *It is important to note that there had been no state judicial decision prior to the issuing of the bonds.* This case cannot, therefore, be explained away on the basis that the state court's opinion had *changed* a prior decision. This Court held, in effect, that a state court's decision may impair contract rights. While it is true that in this case the state court had misapplied a state legislative measure, the state constitution, it would not comport with reason to hold that the Contract Clause *prohibits a state court* from impairing a contract, if the state court misapplies one kind of law, i.e., a statute or a constitution, but not if that court misapplied another kind of law, for instance, general principles of common law. To the same effect, see *Board of Commissioners of Stanly County* v. *W.N. Coler and Co.,* 190 U.S. 437, 445, 23 S. Ct. 811, 814 (1903), in which this Court stated:

> "*Burgess* v. *Seligman* was applied in *Folsom* v. *Township Ninety-six,* 159 U.S. 611, 40 L. Ed. 278, 16 Sup. Ct. Rep. 174, to sustain the validity of bonds issued by the defendant township to aid in the construction of a railroad. The power to issue them depended upon several statutes and the constitution of the state. After the bonds were issued the supreme court of the state decided that the statutes authorizing the issue of the bonds were unconstitutional. *There had been no decision to that effect prior to the issuing of the bonds.* We held that the decision of the supreme court [of

> the state] was not binding and construed the constitution and statutes for ourselves, and sustained the bonds." (Emphasis supplied).

In a case involving a decision of the same state court as the one in the case at bar, the Supreme Court of Ohio, this Court held that the state court's decision impaired the contract obligations of a private contract. In *Great Southern Fire Proof Hotel Company* v. *Jones, et al.,* 193 U.S. 532, 24 S. Ct. 576 (1904), there was a private contract under which Jones and Laughlin were to furnish steel for the construction of a hotel at Columbus, Ohio. Jones and Laughlin sued in a federal court to enforce a lien upon the hotel building under an Ohio statute which gave a lien on the property to a supplier of building materials. The United States Circuit Court dismissed the action on the ground that, subsequent to the formation of the contract, a state court decision had declared the Ohio statute to be unconstitutional. In reversing this decision, the United States Circuit Court of Appeals held that the statute did not violate the Ohio constitution. The latter decision was upheld by this Court, which said:

> "In *Pleasant Twp.* v. *Aetna L. Ins. Co.,* 138 U.S. 67, 72, 34 L. Ed. 864, 867, 11 Sup. Ct. Rep. 215, where the rights of one of the parties depended upon the validity of a statute of Ohio, and which statute the supreme court of Ohio had held after the rights of the parties had accrued, under their contract, to be in violation of the Constitution of that state, this court, although reaching the same conclusion as that announced by the state court, took care to say that the decision of the state court did not conclude this court, and that concurrence with the views expressed by the

state court was the result of the exercise of its *independent judgment,* citing *Burgess* v. *Seligman* as having settled the law upon this subject." 193 U.S. at 545, 24 S. Ct. at 579. (Emphasis supplied).

Answering a contention that the federal court should follow decisions of the Ohio courts in their interpretation of the state constitution and laws, this Court said:

> "The difficulty in applying this principle here is that prior to the two cases in 55 Ohio St., the supreme court of Ohio had not, we think, established any rule of constitutional construction that would necessarily require us to hold the act of 1894 to be unconstitutional." 193 U.S. at 547, 24 S. Ct. at 580.

There is no doubt that the preceding cases discussed in this point I established the rule that this Court would protect contracts from impairment by state judicial decisions as well as from impairment by state laws. They also held that this Court would refuse to follow the latest decision of a state tribunal, if to do so would impair the validity of a contract which was valid by the state court's interpretation of the law in existence when the contract was made. As it will be shown in points III and IV, *infra,* the majority *changed* its interpretation of the state law in regard to petitioner's contract rights which, by prior decisions of that court, were valid when the contract was formed.

1. Cases coming to this Court from state courts.

A distinction has sometimes been made between cases coming to this Court from lower federal courts and those coming from state courts so far as relief

from state judicial decisions impairing contracts is concerned. This Court has held in some cases that it will not review by writ of error *state decisions* impairing the obligations of contracts. In *Bacon* v. *Texas,* 163 U.S. 207, 16 S. Ct. 1023 (1896), the Court held that it would be free to disregard changes in state court interpretations of state constitutions and laws when the subsequent state judicial decision would render invalid a contract which, under the laws in existence at the time when it was formed was valid. However, with respect to appeals from *state courts,* it was stated:

> "*This court has no jurisdiction to review a judgment of a state court made under precisely* the *same circumstances,* although such state court thereby decided that the state legislation was void which it had prior thereto held to be valid. It has no such jurisdiction, because of the absence of any legislation subsequent to the issuing of the bonds which had been given effect to by the state court. In other words, we have no jurisdiction, because a state court changes its views in regard to the proper construction of its state statute, *although the effect of such judgment may be to impair the value of what the state court had before that held to be a valid contract.* When a case is brought in the United States court, comity generally requires of this court that in matters relating to the proper construction of the laws and constitution of its own state, this court should follow the decisions of the state court; yet in exceptional cases, such as *Gelpcke* and others, *supra,* it is seen that this court has refused to be bound by such rule, and has refused to follow the later decisions of the state court. A writ of error has been dismissed in this court (Mississippi and M. R. Co. v. McClure, 10 Wall. 511) where the judgment sought to be re-

viewed was that of a state court, holding that certain bonds were void upon precisely the same facts that this court in the Gelpcke case held were valid. There was no subsequent legislative act impairing the obligation, and hence this court had no jurisdiction to review the judgment of the state court." 163 U.S. at 221, 16 S. Ct. at 1029. (Emphasis supplied).

But even the rule enunciated in the first sentence of the statement just quoted has not been followed by this Court in some cases. Thus, jurisdiction has been held by this Court to exist in the following cases all of which came from state courts by writs of error: *McCulloch* v. *Maryland,* 4 Wheat. 316 (1819); *State Bank of Ohio* v. *Knoop,* 16 How. 369 (1853); *Ohio Life Insurance and Trust Co.* v. *Debolt,* 16 How. 416 (1853); and *Louisiana* v. *Pillsbury,* 105 U.S. 278, 26 L. Ed. 1090 (1882).

If these cases involved legislation, this cannot be the ground on which the following two cases, which also came to this Court by writs of error to the state courts of New York, can be explained: *Muhlker* v. *N.Y. and Harlem Railroad Company,* 197 U.S. 544, 25 S. Ct. 522 (1905), and *Sauer* v. *New York, supra.* These cases will be discussed in detail in point II, *infra.* It is sufficient to state here that this Court held, in *Muhlker* and *Sauer,* that the contract had been impaired by a *change* of state judicial decision and not by any state statute. Any involvement of statute was very remote.

It may well be that the cases in which this Court refrained from taking jurisdiction on writs of error to a state court may be explained by an apprehension on the part of the Court that it may be flooded with

cases involving impairment of contracts. In *Mississippi and Missouri Railroad Co.* v. *Rock,* 4 Wall. 177, 181 (1867), the Court refused to examine a state decision and said:

> "If this were the law, every case of a contract held by the state court not to be binding, for any cause whatever, could be brought to this court for review, and we should thus become the Court of final resort in all cases of contract where the decisions of state courts were against the validity of the contracts set up in those courts."

As stated above, this Court has entertained jurisdiction in certain cases coming from state courts on *writs of error.* With the use of *a writ of certiorari,* which would have to be availed of in cases where a state judicial decision was claimed to have unconstitutionally impaired a contract, 28 U.S.C. § 1257(3), this Court would not, of course, be flooded with "every case of a contract held by the state court not to be binding, for any case whatever." In such cases, this Court would, of course, have discretion regarding writs of certiorari.

Furthermore, it is respectfully submitted that the constitutional prohibition against impairment of contracts does not say that only in cases brought to this Court from lower federal courts may this Court remedy an impairment of a contract and that it should condone impairment if a case comes to this Court from a state court. It is difficult to determine just how this distinction may be justified in the light of the language of the constitutional provision. Such a distinction would be inconsistent with the intent of the framers of the Constitution, a question which will be discussed in detail in this point I, C, *infra.* It is sufficient to men-

tion here that their intent was a broad one, to prevent states from impairing contracts. It would be inconsistent with this purpose to say that the framers wanted to prohibit impairment in the comparatively smaller number of cases where parties to a contract were citizens of different states, but to extend impunity to impairment in the larger number of cases where the parties resided in the same state.

It may also be observed that, although, from one point of view a decision of a court may not be considered law, cogent and persuasive principles have led this and other courts to treat a judicial decision as law. A court decision which holds a statute unconstitutional would have the same effect as a legislative act repealing the statute and voiding all contract rights which may have been acquired under it, and if the Contract Clause be interpreted as one addressed to state legislation alone, this Court may give a remedy against a statute but not against a judicial decision, although the effect of the two is the same. As already stated, however, this Court has given remedy against unconstitutional impairment of contract rights by state courts.

Another class of impairment cases came to this Court from state courts: *Wright* v. *Nagle,* 101 U.S. 791, 25 L. Ed. 921 (1880); *McGahey* v. *Virginia,* 135 U.S. 662, 10 S. Ct. 972 (1890). The Court felt constrained to reconcile them to the holding that only impairment cases from lower courts are cognizable before this Court. With all due respect to this Court, it may be stated that the explanation appears to be rather apocryphal. It is that they involve questions whether *there was a contract* and whether the law as

enforced by the state impairs it. The fact that a law of the state constitutes part of the contract should not make any difference. The Contract Clause refers to all "Contracts," not only those made by a state by the enactment of a law but also those made by *private parties.* Impairment of either class of contracts is envisaged by that Clause. If one class can come before this Court from a state court the other one should also be allowed to be brought here.

Still another class of impairment cases came from state courts: *State of Louisiana ex rel. Hubert* v. *New Orleans,* 215 U.S. 170, 30 S. Ct. 40 (1909); *Louisiana Railway and Navigation Co.* v. *Martin Behrman,* 235 U.S. 164, 35 S. Ct. 62 (1914). Again this Court is constrained to reconcile this class to the doctrine that only impairment cases from lower courts can come before this Court. Another unconvincing explanation was made: The cases did not give effect to a *subsequent* statute but this was said to be the *effect* of the judgment.

2. Action by municipalities.

If state courts are not within the meaning of the Contract Clause, are municipalities envisaged thereby? This Court answered this question in the negative and in a later case *reversed itself* and held the opposite. If the Clause is flexible enough to permit such antithetical holdings, it is submitted that it is elastic enough to justify reversal of any prior cases to the extent that the Court may find it proper to hold that they lack the persuasiveness necessary to prevent a clearcut declaration by it that state judicial decisions impairing contracts are within the ambit of the Clause.

The case that held that actions by municipalities were not embraced by that Clause is *Township of Pine Grove* v. *Talcott,* 19 Wall. 666 (1874). The facts were as follows. In 1869, the legislature of Michigan passed an act enabling any township to pledge its aid, by loan or donation, to any railroad company in the construction of its road. Pursuant to this act a meeting of the electors of the township of Pine Grove was called to vote upon a proposition whether the township should give to the railroad company bonds to the amount of $12,000. By a majority vote it was resolved that the bonds be issued. The plaintiff, Talcott, was the holder and owner of a part of the bonds and they were overdue. He brought this action to recover their amount. The township defended on the sole ground that the Michigan statute of 1869 was void as being in conflict with the Michigan constitution. The Circuit Court for the Western District of Michigan, having overruled the defendant's demurrer, the case was brought before this Court which affirmed the lower court's judgment. In its opinion, this Court referred to the provision in Article XIV of the Michigan constitution which provided that the credit of the state shall not be granted to, or in aid of, any person, association or corporation. The Court held that "there was no Constitutional prohibition against such legislation."

This Court also made the following statement: "In this case it is the *township and not the State* that is concerned. The State has done nothing, and is in no wise liable." 19 Wall. at 674 (Emphasis supplied). This is an important statement in reply to contentions that assimilate municipalities to a state, so far as the Contract Clause is concerned, on the ground that municipal ordinances or resolutions are legislative in

character. In the *Talcott* case, the resolution of the township was held not to be the act of the state. The Court said: "The State has done nothing."

If the Court in *Talcott* had applied the reasoning in the *Appleby* case, *infra,* p. 42, it could just as easily have held the opposite of the statement just quoted. It would have held that the resolution of the municipality was "equivalent" (this word was the alchemy by which the action of an administrative official was assimilated to a state in *Appleby*) to an act of the state. But it did not do that. On the contrary, it in effect held that a constitutional provision expressly prohibiting certain action to a "State" should not be interpreted as prohibiting similar action by a "municipal corporation" in the absence of mention of the latter in the constitution. In other words, the *Talcott* case held in effect that language such as is found in the Contract Clause cannot be interpreted to include a "municipality" merely because the Clause uses the word "State."

As stated above, Article VI of the Michigan constitution forbade the "State" from granting aid to any person, association or corporation but, like the Contract Clause of the National Constitution, did not use the word "municipality" after the word "State." In this connection, the Court in *Talcott* stated:

> "The case as to the constitution is a proper one for the application of the maxim, *Expressio unius est exclusio alterius.* The instruments is drawn with ability, care, and fulness of details. If those who framed it had intended to forbid the granting of such aid by the municipal corporations of the State, as well as by the State itself, it cannot be that they would not have explicitly said so. It

is not to be supposed that such a gap was left in their work from oversight or inadvertence." 19 Wall. at 674.

With the substitution of the words "the passing of Law impairing the Obligation of Contracts" for the words "the granting of such aid," the statement just quoted could just as easily be applied by this Court in all the cases in which municipalities' actions were held by this Court to be the same as those of a "State" so far as the Contract Clause is concerned. With that substitution, the statement would read:

> "The case as to the constitution is a proper one for the application of the maxim, *Expressio unius est exclusio alterius.* The instrument is drawn with ability, care, and fulness of details. If those who framed it had intended to forbid *the passing of law impairing the obligation of contracts* by the municipal corporations of the State, as well as by the State itself, it cannot be that they would not have explicitly said so. It is not to be supposed that such a gap was left in their work from oversight or inadvertence." The center italics part takes the place of the phrase "the granting of such aid".

The respondent may contend that this Court has no jurisdiction in this case under the Contract Clause. In reply to such an argument it may be pointed out that in *Talcott,* counsel had contended:

> "The only point in issue below was the meaning of the constitution of the State, and on such a question it was the duty of the court below to have taken as true the meaning put upon it by its highest judicial tribunal. If a contrary course of proceeding is permissible there is an *end to the independence of the judiciary of the States, and*

> *the decisions of tribunals which are confessedly constitutional expositors of the local law, are reviewed and reversed by a tribunal possessing no authority to exercise such functions* upon any theory of State and Federal jurisdiction hitherto recognized in our judicial history." 19 Wall. at 670 (Emphasis supplied).

Notwithstanding these arguments of counsel, this Court not only held that it had jurisdiction but clearly stated that state statutes as well as state judicial decisions may impair contracts within the meaning of that Clause.

The *Talcott* case, however, did not prevent the Court from holding the opposite view in *Cuyahoga River Power Company* v. *City of Akron,* 240 U.S. 462, 36 S. Ct. 402 (1916), in which a bill in equity was brought by an Ohio corporation against a municipality of Ohio to prevent the latter from appropriating the waters of a stream. The plaintiff alleged that this action would violate the said Clause and the Fourteenth Amendment of the Constitution of the United States, hereinafter referred to as the Constitution. After reciting the allegations of the bill the Court stated: "It is established that *such action* [*of the municipality*] *is to be regarded as the action of the state, Raymond* v. *Chicago Union Traction Co.,* 207 U.S. 20, 52 L. Ed. 78, 28 Sup. Ct. Rep. 7, 12 Ann. Cas. 757." (Emphasis supplied).

It is important to note that not only was the municipality in *Talcott* as much a political subdivision of the state as the municipality in *Cuyahoga* but, in the former case it was acting under a state statute, and yet, according to *Talcott,* neither of those conditions

was sufficient to lead this Court in that case to arrive at the conclusion that a municipality could be included in the word "State," a word which, in *Cuyahoga* was found to be flexible enough to include municipalities. Respondent might endeavor to exclude courts from the word "State." But if a municipality's action is to be regarded "as the action of the state," why cannot a state court's action also be so regarded?

> "A State acts by its legislative, its executive, or its judicial authorities. It cannot act in no other way . . . and as he ["Whoever, by virtue of public position under a state government"] acts in the name and for the State, and is clothed with the State's power, his act is that of the State." *Ex parte Virginia,* 100 U.S. 339, 347, 25 L. Ed. 676, 679 (1880).

In this connection it may not be inappropriate to call attention to international law which, after all, is also part of our domestic law. International courts have held that the *law* of a country as declared by its tribunals may amount to a denial of justice. The state as such is held responsible because of a law which is *not passed by its legislature* but *is declared as law in a judicial opinion.* In other words, the act of the domestic court is held to be the act of the "State."

In the case of *The United States of America on behalf of George Adams Kennedy* v. *The United Mexican States,* the American-Mexican Claims Commission decided that Mexico should pay to the United States on behalf of Kennedy an award of $6,000 because of the miscarriage of justice in connection with a trial in a Mexican court. In a separate opinion by the American Commissioner, Nielsen, rendered on May 6, 1927, it was stated that an international tribunal does

not, of course, "act as an appellate court, but it is not precluded from making a most searching examination of judicial proceedings, and it is the duty of a tribunal to make such an examination to determine whether the proceedings in a given case have resulted in a denial of justice as that term is understood in international law." *American-Mexican Claims Commission, Opinions of Commissioners,* under the convention of September 8, 1923 (1927), 289, 299.

Respondent may also endeavor to differentiate between a court and a muncipality by contending that the latter has legislative functions. Any value in this argument did not prevent this Court from holding in effect in the *Talcott* case that a municipality did not "pass laws." Furthermore, it would be sophistry to assimilate the refusal of a permit by an administrative official to "passing a law" and yet, this was the effect of the decision of this Court in a case to be discussed shortly, the *Appleby* case, *infra,* p. 42. If a public official's refusal of a permit—which was the issue in that case—can be held by this Court to be "law passed by the legislature of the State," it is submitted that this Court, for all the reasons stated in point I, should re-examine its decisions concerning the meaning of the Contract Clause to see if exclusion of state judicial decisions is justified when refusal of a driver's license for instance is considered to be an act of "passing a law". It is respectfully submitted that if that Clause is elastic enough to make the refusal of a driver's permit a "law passed by the legislature of the State," it is elastic enough to permit this Court, if it finds that justice and the other factors that are involved in the judicial process require it to do so in any particular case, to hold that the Clause is comprehensive

enough to envisage law declared to be such in a state judicial decision. It is also interesting to note that, after holding that a municipality is not included within the meaning of the Clause, and after deciding exactly the opposite in a later case, this Court held that not all actions of municipalities could be held to be envisaged by the Clause.

In *Hamilton Gaslight & Coke Co.* v. *City of Hamilton,* 146 U.S. 258, 266, 13 S. Ct. 90, 92 (1892), the Court stated:

> "A municipal ordinance, *not passed under supposed legislative authority,* cannot be regarded as *a law of the state,* within the meaning of the constitutional prohibition against state laws impairing the obligations of contracts. Murray v. Charleston, 96 U.S. 432, 440; William v. Bruffy, Id. 176, 183; Water Co. v. Easton, 121 U.S. 388, 392, 7 Sup. Ct. Rep. 916; New Orleans Water Works v. Louisiana Sugar Co., 125 U.S. 18, 31, 38, 8 Sup. Ct. Rep. 741." (Emphasis supplied).

In *Hamilton* the Court interpreted the Clause to include municipalities but only *to a certain extent.* A municipality's ordinance not passed "under supposed legislative authority" was not "law" within the Clause, according to this Court.

Petitioner begs the indulgence of the Court in raising the query whether the framers of the Constitution really intended all those refinements of the Clause and whether, had the question been raised with them, they would not have answered something like this: "By the Contract Clause we mean to prohibit *any action* by the State or its organs, including its courts, impairing contracts. We use the words to 'pass a Law' because, at this time, the legislatures of States

are the main culprits in that respect. We do not, however, by the use of these words, intend to permit other organs of the states, especially those that in the future may be even more active than the legislature in the contract field, e.g., state courts, to impair contracts." The intent of the framers will be discussed in detail, *infra*, p. 46.

3. Action of administrative officials.

In *Grand Trunk Western Railway Co.* v. *Railroad Commission of Indiana*, 221 U.S. 400, 31 S. Ct. 537 (1911), an order of an *administrative body*, the defendant, was held to be "law" within the meaning of the Contract Clause on the ground that the order was "a legislative act by an instrumentality of the state exercising delegated authority."

Governmental administrative bodies are created by constitutions or statutes. So are courts. Myriads of decisions and orders are made by administrative officers without their thinking that they are "passing a law." Like courts, they proceed to apply, in some cases, general principles of law in construing statutes or common law and arriving at decisions in cases before them. Such administrative agencies are, in effect, quasi-judicial bodies rather than legislatures. Their process in arriving at a decision is more similar to the judicial one than to the legislative. If their decisions can be "law" under the Contract Clause, it should also be held that a decision of a court is "law" within the meaning of that Clause, at least at between the parties. After all, state courts, like state administrative bodies, have the right to render orders, judgments and decisions only because the legislature has created them as state instrumentalities and gave them that right.

But what about the action of a state administrative official who refuses a permit, a permit to an individual, for instance, a driver's license? Does he thereby enact a statute? Does he thereby "pass a law"? He does, according to *Appleby, et al.* v. *Delaney, Commissioner of Docks of City of New York,* 271 U.S. 403, 46 S. Ct. 581 (1926). The Commissioner had refused to give to plaintiff a permit to fill up certain water lots. Plaintiff alleged that this refusal violated his contract rights under a contract with the city of New York. The New York Court of Appeals, construing the contract in the light of New York law, upheld the refusal. This Court said that it "cannot agree" with this decision, 271 U.S. at 413, 46 S. Ct. at 584, and ruled that the refusal of the permit *impaired* plaintiff's constitutional rights *within the meaning of the Contract Clause.* The Court's ground was that the refusal of the Commissioner was "equivalent to a statute of the state" and that it is "law" within the meaning of that Clause. If an administrative official's refusal of a permit can be transmuted, by the alchemy of the word "equivalent" into a "statute" or "law," why may not a judge's refusal of a permit be also so transformed as being at least "equivalent" to law? Let us assume that an administrative official refuses a permit to parade. According to *Appleby* this is "law" within the ambit of the Clause. Let us further assume that the refusal is brought before a court which, reversing the administrative official's decision, authorizes the parade. Why is not the court's action also "law" or "equivalent" to "law"?

If the administrative official's action is said to be envisaged by the Clause because he acts under authority of a law creating his office, cannot it also be said, with

equal logic and reason, that the state law that creates a state court also brings its action within the Clause or within the other ground of explanation of the administrative official's action, i.e., action under authority of law?

Petitioner appreciates the fact that law does not always coincide with legoc, reason, or, at times, even justice. But one of law's objectives is to harmonize conflicting interest, and, if at all possible, not to give the appearance of injustice. From this point of view it would be almost incomprehensible to petitioner to say to him that this Court is of the opinion that, if a decision had been reached by an Ohio administrative agency (*Grand Trunk Western Railway Co., supra*), or even by an Ohio administrative official (*Appleby, supra*), such a decision would be "law," and if this Court found that the decision had impaired his contract rights, he could recover damages *but that it is not "law" because it has been reached by an Ohio court!*

B. What Might be Called a Literal Interpretation of the Contract Clause Would Lead to a Juridical Impasse.

We have seen in the above discussion in point I, A, *supra,* that, even if what might be called a literal interpretation of the Contract Clause could be said to refer only to state legislation, this interpretation has been departed from by this Court and properly so. It would lead to a juridical impasse of major proportions. If literally taken, the Clause would cover almost all state laws regulating contracts since its inception. Such laws usually take the form of making invalid certain kinds of contracts or qualifying their effect. State laws requiring certain formalities to satisfy statutes of fraud impair at least previous con-

tracts not made according to those formalities. The same holds true with respect to state statutes of limitation, regulations concerning forms of negotiable instruments, or fixing rates of interest—all of them impairing previous contracts, to say nothing as to future ones.

At any particular time, the "Obligation of Contracts" is the resultant of all the contract laws at that time and any law which, then, or *in futuro,* diminishes the obligation of contracts in its totality *impairs* such obligation as of the time in question. And since the said Clause spoke as of the effective date of the Constitution, if this Court is to interpret it literally, the Clause must be taken to *crystallize, as of that date* all the state laws that antedated the Constitution. This would mean that, if this Court were to follow a literal interpretation, states could not, after 1789, diminish their regulations of contracts and as of that year all state power over contracts would have to come to an end.

The customary use of the work "impair" in the Clause does not refer only to a law passed *before* the contract it affects was formed, and nothing in the discussions of the framers shows that the word was not used by them in its accepted use. The word relates to all contracts, those formed *prior* as well as those formed *after* such law. It is uncontrovertible that, if the word is used in other sentences which are free of any slanting in favor of any accepted legal doctrine, e.g., "electricity impairs the usefulness of candles," the word means *all* candles.

It is obvious that the word would be understood to mean that impairment affected not only candles exist-

ing at the time of the invention, but also those that came into existence since that time as well as those that may come into existence hereafter. Suppose a constitution provides that "No state shall pass any law impairing the right of action for false imprisonment." Would it be reasonable to contend that this provision covered only such state laws as impaired the right of action for false imprisonment committed *before* these state laws were passed? It seems clear that literally the Contract Clause covers *all laws impairing* contracts whether formed *before* or *after* such laws. And yet it has been interpreted to cover only contracts formed *previously* to the law impairing them. *Ogden* v. *Saunders,* 12 Wheat. 213 (1827). This is still the law. In that respect this Court has not hesitated to depart not only from the literal meaning of the Clause but also from the intent of the framers thereof.

During the Philadelphia Convention's sessions of September 14 and 15, 1787, George Mason moved the insertion of the word "previous" after the words "obligation of" in the Contract Clause. His motion was "refused," Max Farrand, *The Records of the Federal Convention* (1937), II, 547, 597, IV 59.

The above comments concerning the meaning of the word "impair" show that this Court has not hesitated to depart from a literal construction of the said Clause. They also show that, if the word is to cover *all* contracts, past as well as future, one may go so far as to say that the Convention was making the issue of the prevention of state impairment of contracts *the sole and exclusive concern of the Federal Government. State impairment* of contracts was not to be permitted. *State power* in that connection was deliberately voted down. This may be oblique but is most cogent evidence

that the intent of the Convention was not to allow impairment by *any organ of the state* and that the use of the words "no State shall pass a Law" was intended to include the organ principally responsible for impairment at that time but not to condone impairment by other state organs.

C. Intent of the Framers of the Constitution Regarding the Contract Clause.

It requires no citation of authorities to show that the reason, object and legislative history of a constitutional or statutory provision are to be considered in arriving at its meaning. Also, that, when its interpretation leads to an injustice (as it would in this case if petitioner is denied recovery—an issue discussed in points III and IV, *infra*), leads to a juridical impasse (see subheading B under this point I, *supra*), and appears to be unwarranted (when compared to the interpretation this Court has given to the words of the Contract Clause in certain cases that have already been discussed above in this point I with respect to municipalities, *supra,* p. 33, and administrative officials, *supra,* p. 41), justice and the rule of law require that an unsound and unwarranted interpretation which would exclude state judicial decisions impairing contracts from the operation of the Clause be rejected.

Much of what took place in the framing and adoption of the Constitution can be explained in terms of economic forces and reasons. This is shown in the debates in the Philadelphia Convention of 1787 and in the writings of contemporary authors.[1] Protection

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[1] John Marshall, *Life of George Washington (1804-07)*, V, 85 et seq.; David Ramsay, *History of the United States (1816-17)*, II, 429, III, 77.

of private property was also the economic motive for the inclusion of the Clause in question as for certain other provisions of the Constitution.

The primary purpose of said Clause is obvious in its very terms, i.e., to protect the security of contracts. Impairment of contracts was the danger that it was intended to prevent. Did the framers mean to say that such impairment was permissible if done by any other governmental organ of a state than its legislature? It would not be reasonable to attribute to them such contradictory motives. So to conclude would be to elevate to primacy the means mentioned in the Clause (passing of a law by a state) and relegate to subordinate position the primary purpose of that clause (prevention of impairment of contracts), i.e., to sacrifice the primary for the subordinate.

The reason that the means of preventing impairment of contracts was addressed to a state's enactment of a law was not to permit impliedly other means of state impairment. The reason was that at the time of the framing of the Constitution, the principal cause of impairment was state legislation.

Under the Confederation, there were many state laws that were unwelcome to the well-to-do classes to which some, if not most, of the framers of the Constitution belonged. Many state laws providing for the issuance of paper money required creditors having contracts with debtors to accept this currency as payment of private debts.[2] Contracts fixing the time of payment of debts were impaired by so-called "stay laws" of states extending the time of payment.

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[2] D. R. Dewey, *Financial History of the United States (1920)*, Ch. II.

Contracts calling for payment of a debt in a single sum were impaired by state laws providing for installment payments. Contracts requiring payment in cash were impaired by state laws substituting payment in commodities.[3]

What Madison characterized in his contemporary statement[4] as "the evils issuing from these sources" prepared the public for the constitutional reforms. Writing to Jefferson on October 24, 1787,[5] and having in mind the plan of his state, Virginia, for a national veto on all state laws, Madison stated that "restraints against paper emissions and violations of contracts are not sufficient." Would Madison, one of the five members of the 1787 Committee on Style which prepared the Contract Clause,[6] thinking, as he did, that all state laws should be subject to national veto, have interpreted the Clause to allow by implication impairment of contracts by other state organs than the state legislatures? By mentioning the latter, it was not intended to exclude other state organs such as courts. Such role, if any, as had been played by those courts in impairing contracts was overshadowed by the activities of state legislatures binding all citizens in the state as a result of general acts applicable to all kinds of contracts. Therefore, the principal culprit, state legislation, was mentioned, but this mention was

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[3] For a survey of these laws, see Allan Nevins, *The American States During and After the Revolution, 1775-1789* (1924), 386, 390, 404, et seq.

[4] *Writings* (Hunt ed.), V, 27.

[5] *Ibid.*

[6] Max Farrand, *op cit.*, II, 619. The other four members who, like Madison, were lawyers, were: Hamilton, Johnson, King and Gouverneur Morris.

only the means. The primary goal and purpose of the Clause was to prevent state impairment of contracts and, as stated above, one should not subordinate the secondary, the means, to the primary, the goal. And as we have seen, point I, *supra,* p. 21, and point II, *infra,* p. 62, this Court has allowed the primary purpose to prevail even where impairment of a contract resulted from state judicial action although such action is not expressly mentioned in the said Clause.

The intention of another member of the Committee on Style, Rufus King, may be gleaned by his proposal on August 28, 1787, at the Convention. About three months after the Convention had assembled he introduced the first motion "to add, in the words used in the Ordinance of Congress establishing new states, *a prohibition on the states to interfere in private contracts.*"[7] (Emphasis supplied).

It is important to note that what King had in mind was not only a prohibition against legislative acts but a general *"prohibition on the states"* which would clearly include *all organs of the states.* Furthermore, the language of the Ordinance referred to in King's proposal showed clearly not only that preservation of property rights was intended but also that "law" in general, not only legislation, was to be banned if it impaired contracts. The reference was to the Ordinance for the Northwest Territory enacted by the Congress under the Articles of Confederation on July 13, 1787, while the session of the 1787 Convention was in about its seventh week. The second article of this Ordinance contained the first contract clause and

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[7] *Ibid.,* 439.

read: "And in the *just preservation of rights and property,* it is understood and declared, that no *law* ought *ever to be made or have force* in the said territory, that shall, in any manner whatever, interfere with or affect private contracts, or engagements *bona fide,* and without fraud previous formed."[8] (Emphasis supplied except for *bona fide*).

The word "law" in the Ordinance is generic enough to cover not only any law that is made but also any other law, for instance a law that a court declares, in the words of the Ordinance, to *"have force."* Certainly, a lawyer with such broad view of the law in relation to impairment of contracts as King apparently had, would not have intended the Contract Clause as it came out of the Committee on Style—which was also the final form in the Constitution—to permit law, as declared by another organ of a state, a court, to impair contracts.

King's aforesaid motion of August 28 was opposed by Gouverneur Morris and George Mason, the latter arguing that in cases within the jurisdiction of federal courts, they would afford protection and that, within the state, the legislature should be free to act.[9] It is clear, of course, that his second reason did not prevail. His first reason is, however, indicative of an intent on the part of the framers of the Constitution that federal courts would grant protection in cases *within their jurisdiction.* There was no limitation as to the cause of impairment. If the case was within the jurisdiction, for instance a case of diversity of citizenship, the federal court would afford protection whether the

[8] 1 U.S. Code (1964 ed.), XXXVII, XXXVIII.

[9] Farrand, *op. cit.*, II, 439.

impairment was caused by legislative act or by judicial decision.

Wilson supported King's motion at the Convention. With respect to Mason's objections that a prohibition of legislative acts impairing contracts would be unwise because it would tie the hands of the states, Madison asked whether this was not already done by the prohibition of *ex post facto* laws. But up to that point of the discussions in the Convention only Congress was prohibited from enacting *ex post facto* laws.[10] Probably for this reason Rutledge proposed to extend this inhibition to states. He "moved instead of King's motion to insert—'nor pass bills of attainder nor retrospective laws.' "[11]

Although Rutledge's motion was adopted, the Clause in question was changed by the Committee on Style in the last few days of the Convention. In the Committee's report of September 14 the Clause prohibited a state from passing laws "impairing the obligation of contracts."[12] Unfortunately, there is no record of the Committee's proceedings or discussions.[13]

The Committee's clause was accepted by the Convention without any discussion and it is this Committee's draft that is contained in Article I, Section 10 of the Constitution.

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[10] *Ibid.*, II, 375, 376.

[11] *Ibid.*, II, 440.

[12] *Ibid.*, II, 619.

[13] It is interesting to note that on Mason's copy of the Committee's draft a note shows the rejection of a motion to insert the word "previous" before "obligation," *Ibid.*, II, 636; IV, 59.

In number 44 of the *Federalist* by Madison, it is stated:

> "Bills of attainder, *ex post facto* laws, and laws impairing the obligation of contracts, are contrary to the *first principles of the social compact and to every principle of sound legislation. The two former are expressly prohibited by the declarations prefixed to some of the State constitutions, and all of them are prohibited by the spirit and scope of these fundamental charters.* Our own experience has taught us, nevertheless, that additional fences against these dangers ought not to be omitted. Very properly, therefore, have the Convention added this constitutional bulwark *in favor* of personal security and *private rights;* and I am much deceived if they have not, in so doing, as faithfully consulted the genuine sentiments as the undoubted interests of their constituents." (Emphasis supplied, except for *ex post facto*).

If impairment of contracts was thought to be a violation of such fundamentals as "first principles of social compact" and "the spirit and scope" of state constitutions, it is not unreasonable to conclude that something more than what is prohibited by principles of "sound legislation" was involved.

It might be asked why the framers used an expression that no state shall *pass a law* impairing contracts. In addition to the reasons adduced above, it may be pertinent to point out that the word "state" is broad enough to cover all organs of the state, including judicial ones; and that the words "shall pass" were used to refer to what, at the time of the framing of the Constitution, was the principal culprit of impairment, but without any intent, on the part of the framers either to restrict the inherently broad meaning

of the word "state" (which, of course, includes not only the legislature but also other state organs) or to exclude impairment by other state organs.

The intent of the framers was a broad one: to prevent impairment of contracts by states. They did not contemplate to imply by the Contract Clause that impairment of contracts was permissible by the state if done by any of the other organs of the state than its legislature. A contrary conclusion would be unwarranted. As already pointed out, one could go so far as to say that, with respect to the subject of impairment of contracts, they intended to give sole and exclusive jurisdiction to the federal government. Even contracts to which states were parties were not to escape the federal government's ban. Did the Clause include such contracts? Where an interpretation thereof as including such contracts was considered just, Chief Justice Marshall did not hesitate, in *Fletcher* v. *Peck,* 6 Cranch 87 (1810), to extend it to such contracts even though he was not certain, as it is shown in his opinion, that it applied to such contracts.

It is sufficient in the case at bar to state that, even if the framers intended to prohibit impairment of contracts by the legislature, the broad purpose they had in mind would not be consistent with an interpretation that they contemplated to condone impairment by means of judicial construction of state legislative enactments. And if an erroneous decision of a state court interpreting a state statute is violative of the said Clause, it would be almost metaphysical reasoning to hold that it is not the opinion which is the cause of the impairment.

If the Clause does not envisage a state court's decision, then logically, if (1) such a decision inter-

prets a state statute to be against the state constitution by the application of what that court believes to be proper application of state law (*Anderson* v. *Santa Anna Township, supra*), and if (2) in the opinion of this Court, the said statute is not against the state constitution, this Court should say that the impairment has been caused by *a state judicial opinion* and *not by the statute* and, if state judicial decisions are not envisaged by the said Clause, permit the state court with impunity to continue its course. But this Court has not done this. It has taken jurisdiction in such cases and thereby, from a logical as well as a juridical point of view, held that state judicial decisions are embraced by the Clause.

And if a judicial opinion interpreting legislation can be susceptible of unconstitutional impairment of contracts, it is not required by either sound reasoning or by the Constitution to hold that state judicial opinions impairing contracts when interpreting other sources of law cannot be within the ambit of the Clause.

State legislative activity affecting contracts is not so frequent now as the innumerable state court decisions affecting them. The provision in that Clause had in mind the activity of state legislatures impairing contracts and since the means of potential impairment has now been replaced to a great extent by that of state courts, the maxim *cessante ratione legis cessat ipsa lex* raises the question whether some application of it may not be pertinent in connection with the interpretation of that Clause. It would, of course, be absurd to contend that it should be considered as non-existent. However, since the main purpose of the framers was to prevent impairment of contracts and since, at the time of the framing of the Clause, it

was state legislatures which were the means of impairment, query whether the maxim may not have some application in the interpretation of the Clause in regard to state judicial decisions impairing contract rights. Suppose, for instance, that, at the time of the framing of the Constitution, state courts, rather than state legislatures, were the means of impairment. Would the framers not have expressed their intent that their purpose was to prevent impairment of contracts by any means whatever and that the mention of the means in the Clause was not intended to be limitative with respect to other means violative of the main goal and purpose of the framers?

Furthermore, as a rule of constitutional construction, it is not sufficient to say that the framers did not have in mind impairment of a contract by a state judicial decision. This was clearly stated by Chief Justice Marshall in the famous case of *Dartmouth College* v. *Woodward,* 4 Wheat. 518, 644 (1819):

> "It is not enough to say that this particular case was not in the mind of the convention when the article was framed, nor of the American people when it was adopted. It is necessary to go farther, and to say that had this particular case been suggested, *the languge would have been so varied, as to exclude it,* or it would have been made a special exception." (Emphasis supplied).

Would the language of the Clause have been varied so as to read that "no state shall pass any law impairing the obligation of contracts but impairment of the obligation of contracts by another organ of a state, i.e., a state court, is permissible"?

Such exception would have been so repugnant to the primary purpose of the Clause, to its very spirit,

that it would strain credulity to suppose that the framers would have made such an exception. And in *Butz* v. *Muscatine, supra,* 8 Wall. at 584, this Court held that a contract right "can no more be taken by subsequent judicial decision than by subsequent legislation."

In *William C. Murray* v. *City Council of Charleston,* 96 U.S. 432, 448, 24 L. Ed. 760, 764 (1878), it was stated:

> "There is no more important provision in the Federal Constitution than the one which prohibits States from passing laws impairing the obligation of contracts, and it is one of the highest duties of this court to take care the prohibition shall neither be evaded nor *frittered away.* Complete effect must be given to it in all its spirit. The inviolability of contracts, and the duty of performing them, as made, are foundations of all well ordered society and to prevent the removal or disturbance of these foundations was one of the great objects for which the Constitution was framed." (Emphasis supplied).

In any case, it has been shown in point I that the Contract Clause is not limited to legislation. But even if it were so it is clear that this Court has taken jurisdiction of cases where a state court, by its interpretation of state law has, in the opinion of this Court—which decides the propriety of the interpretation independently of the state court—impaired contract rights.

Point III, *infra,* establishes that petitioner's contract rights were impaired by the majority's *changing* prior Ohio judicial rulings involving common law, and point IV, *infra,* shows that petitioner's contract rights were impaired by a *change* in interpretation of Sections 4101.11 and 12.

D. The Factor of Stare Decisis.

This Court has not allowed the doctrine of *stare decisis,* important as it is in attaining predictability and certainty in law, to constrain it to make it the controlling factor and to disregard other elements entitled to judicial consideration in the proper administration of justice and the rule of law. An example of this may be found in the very field involved in the case *sub judice,* i.e., in a consideration by this Court of the scope of the Contract Clause. In many cases prior to *Gelpcke, supra,* this Court had declared a legal principle which Mr. Justice Swayne had stated to be as follows in *Leffingwell* v. *Warren,* 2 Black 599, 603 (1862), "the construction given to a statute of a State by the highest judicial tribunal of such State, is regarded as a part of the statute, and is as binding upon the courts of the United States as the text; . . ." It was further stated in that case that "If the highest judicial tribunal of a State adopt new views as to the proper construction of such a statute and *reverse its former decision,* this court will follow the latest settled adjudications." *Id.* (Emphasis supplied).

In its succeeding term, this Court had to consider the first of a series of suits based on bonds issued by municipalities in Iowa. The Court found that such bonds could not be sustained consistently with the *Leffingwell* doctrine. The Court, in effect, reversed itself, so far as adherence to a state court's construction of a state statute was concerned, and reversed itself also on adherence to the principle that the latest adjudications of a state court, although they were opposite to prior state courts' decisions, would be followed by this Court. This reversal was decided by this Court, through the same member that had

expressed the above-quoted principles in *Leffingwell, supra.* In *Gelpcke, supra,* Mr. Justice Swayne in delivering this Court's opinion, held that, in cases of contracts, this Court *would not follow the later decisions of the State courts construing their own constitutions* where the consequence of their decision would be to invalidate obligations of the contracts, *if there had been prior state court decisions holding such contractual obligations valid.* In such cases this Court adopted the prior decisions of the state courts as the basis on which subsequent state decisions were disregarded. See also *Lee County* v. *Rogers, supra.* It is important to observe that this Court's reversal of precedents in cases in which there had been *prior decisions* of state courts was declared by the same judge who, in the *Leffingwell* case, had declared that this Court would follow the latest adjudications of state courts.

Nor, as already stated, *supra,* p. 37, has *stare decisis* prevented this Court from overruling the doctrine in *Talcott, supra,* and holding that the Contract Clause envisages not only "States" but also municipalities.

The need for harmonizing the doctrine of *stare decisis* with other important factors was cogently stated by Mr. Justice Story, while, in addition to his membership on this Court, he was teaching at Harvard Law School, in his inaugural Discourse as Dane Professor of Law on August 25, 1829, stated:

> "In truth, the common law, as a science, must be for ever in progress; . . . It is its true glory, that it is flexible, and constantly expanding with the exigencies of society; that it daily presents new motives for new and loftier efforts; that it holds out for ever an unapproached degree of

excellence; that it moves onward in the path towards perfection, but never arrives at the ultimate point." Text from a 1965 Christmas card received by petitioner's counsel.

E. Summary

To hold that the Contract Clause does not prohibit impairment of contracts by state judicial decisions is subject to the following objections.

1. The distinction between cases brought before this Court from lower federal courts and those brought from state courts is constitutionally unsound. The said Clause does not say that states may impair with impunity contracts between citizens of the same state but not contracts between citizens of different states.

2. The said distinction is inconsistent with the broad object and intent of the framers of the Constitution.

3. Such distinction constrains this Court to create other distinctions—petitioner realizes the factors contributing to the desirability of consistency—equally unwarranted by the express language of the Contract Clause and the framers' intent, i.e., a holding that cases can be brought before this Court from state courts only if they involve:

(a) Reversal of prior state judicial decisions.

(b) A question whether there was a contract.

(c) A question whether certain provisions constitute a part of the contract.

4. The aforesaid differences would make the said Clause read in effect as follows:

"No State shall pass any Law impairing the Obligation of Contracts between citizens of

different States. Contracts between citizens of the same State may be impaired unless the impairment is involved in a case brought to a federal court from a State court on the ground of (a) reversal of decision or (b) a question whether there exists a contract or (c) whether certain provisions constitute part of the contract."

Such text is not warranted either by the language of the Clause or by the framers' intent.

5. What may be contended to be a literal construction of the Clause has been departed from by this Court, e.g., in cases including municipalities and administrative officials. The Clause does not say "No State, municipality or administrative official shall pass any Law impairing the Obligation of Contracts."

This addition has led to the rather strained explanation that the refusal of a driver's permit by an administrative official is the same as "passing of a law" by the legislature!

6. Literal construction of the Clause would lead to a juridical impasse. State laws diminishing the obligation of contract rights would have to be crystallized as of the time of the effective date of the Constitution and would permit only such impairing laws as antedated that instrument.

7. Exclusion of state judicial decisions from the application of the Contract Clause would be inconsistent with the intent of the framers of the Constitution.

Conclusion

In other fields of constitutional law than the Contract Clause, when the proper administration of law and justice require extension of rules binding on the Federal Government to states, this Court has not permitted the doctrine of *stare decisis* to be the controlling factor. Nor has it done so when it felt that the doctrine of separate but equal facilities was inconsistent with fundamental constitutional concepts. For the same reasons, it is respectfully submitted that, when gross injustice results from the impairment of a contract by a state judicial decision, this Court should not preclude itself from at least exercising its discretion on a writ of certiorari to consider the gross injustice in the light of applicable principles of law. It should also eliminate the distinction between cases brought before it from lower federal courts and those that come from state courts in cases of impairment of contracts.

To the extent that any previous cases are in conflict with this position, the Court should hold that they are not persuasive. A re-examination of the current vitality of any such cases is long overdue. The instant case affords a forum to hold that, if the word "state" includes, as this Court has interpreted it to include, other organs such as municipalities and even actions of administrative officials, it does not exclude another state organ that declares what the law is daily, i.e., a state court, when its decisions impair contracts.

In brief, the Court should clearly declare that state judicial decisions impairing contracts do not enjoy impunity under the Contract Clause. By so doing the Court would illuminate a twilight zone in the administration of justice that cries out for such judicial clarification.

II. The Contract Clause is violated by a decision of a state court construing its own law where the consequences would be to impair the obligations of a contract valid at the time it was made according to the state law as then construed by the state court.

The issue in this point II is different from, and narrower than, that in point I, *supra*. The position of petitioner in the former is that the Contract Clause is violated when a later state judicial decision *reverses* previous law and thereby impairs rights acquired under a contract valid at the time when it was made according to the law as then construed by the state court. In point I there need be *no reversal* of a prior interpretation of contract rights. The position in I is that such rights cannot constitutionally be impaired either by state legislation or by a state judicial opinion.

As to this point II, it is well established that if a state court has once interpreted a contract, a subsequent *change* by the state court to the injury of a party to the contract violates the Contract Clause. The first case to state this rule clearly was *Gelpcke, supra,* for a discussion of which and its application to this case see *supra,* p. 21.

In *Story* v. *N. Y. Elev. R. Co.,* 90 N.Y. 122, 43 Am. Rep. 146 (1882), plaintiff owned property abutting a street in New York City. Under a legislative act of New York, a railroad corporation was authorized to erect an elevated railroad for railroad purposes in front of plaintiff's property. He as successor to a grantee of the property from the city, claimed that such a structure violated plaintiff's *contract rights* under a covenant in the title deed of his predecessor. The New York courts interpreted the contract between

the city and the owners of land abutting upon its streets as assuring the owner easements of access, light and air, which could not lawfully be impaired by the structure, and that the impairment of those contract rights amounted to taking of the plaintiff's property for which he was entitled to recover damages. The court stated:

> "The question here presented is not whether the legislature has the power to regulate and control the public uses of the public streets of the city, but whether it has the power to grant to *a railroad corporation* authority *to take possession of* such *streets and appropriate them to uses inconsistent with* and destructive of *their* continued *use as* open public *streets* of the city." 43 Am. Rep. at 156. (Emphasis supplied).

The interpretation in *Story* of the contract between the City of New York and owners of property abutting on its streets was relied upon by the plaintiff in *Sauer* v. *City of New York, supra.* In that case, the city erected in a city street, on which the plaintiff was an abutting owner, an elevated viaduct for *general public use, by which travelers were enabled to use such street in connection with other streets from which it had previously been disconnected.* The plaintiff sought to enjoin the city from maintaining the viaduct, or, in the alternative, for the recovery of damages. The highest court of New York having affirmed the dismissal of plaintiff's complaint, he asked this Court to review that action on the ground that his rights under the contract between him, as abutting owner of property on a street, and the city had been unconstitutionally impaired by the decision of the New York court which had denied him compensation. The plaintiff contended that the *interpretation* of the con-

tract involved in the *Story* case, *supra,* amounted to an interpretation *of his own contract, although his own contract had not been interpreted by the New York courts.* In the *Sauer* case, there is a very important point which applies in the case at bar. This Court stated there that *when a state court "has once interpreted the contract existing between the landowner and the city, that interpretation becomes a part of the contract, upon which one acquiring land may rely, and that any subsequent change of it to his injury impairs the obligation of the contract."* 206 U.S. at 549, 27 S. Ct. at 690. (Emphasis supplied). It follows from this that, if an Ohio court has interpreted the rights under the contract involved in this case, "any subsequent *change*" by an Ohio court's decision, to petitioner's injury, "impairs the obligation of the contract."

It is very important to note that the plaintiff in *Sauer was relying not on an interpretation of his own particular contract* with the city regarding the street on which he was abutting as owner, *but on an interpretation of another but similar contract* between the city and another owner of land abutting upon its streets. This Court did not say to the plaintiff in that case that his particular contract had never been interpreted by the New York courts. It did not find this fact to be an essential distinction between the two cases. This Court found that the New York courts *had interpreted the contract* of an abutting owner in the *Story* case, *supra, as securing easements* of access, light and air, *against* the use of *a street by a private corporation,* the railroad company, *while* in the *Sauer* case, *supra,* the New York courts *had interpreted the contract* of an abutting owner *as not securing* such

easements against the use of streets by the city for street purposes. This Court pointed out that, *"before plaintiff* [in the *Sauer* case] *had acquired his title the law of New York had plainly drawn this distinction."* 206 U.S. at 554, 27 S. Ct. at 692. (Emphasis supplied).

And further on:

> *"The plaintiff,* therefore, *has not shown that* in his case *the state court has changed,* to his injury, *the interpretation of his contract* with the city, which it had previously made, and upon which he had the right to rely." 206 U.S. at 555, 27 S. Ct. at 693. (Emphasis supplied).

This Court's decision in the Sauer case was to the effect that, if the elevated structure had been erected by a private corporation, instead of by the city for street purposes, *this Court would have held any interpretation of the contract of any abutting owner by the New York courts which differed from the interpretation in the Story case would have unconstitutionally impaired the contract rights of the owner even though his particular contract had not been previously interpreted by the courts of New York which had interpreted only a similar contract of another person.* In other words, had this Court found that in *Sauer* the contract of the plaintiff had been interpreted by state courts as claimed by him—as petitioner's contract had been previously interpreted—the plaintiff's right would have been unconstitutionally impaired because, as this Court stated, the case would be one

> ". . . within the authority of *Muhlker* v. *New York & H.R. Co.,* 197 U.S. 544, 49 L. Ed. 872, 25 Sup. Ct. Rep. 522, which holds that, *when the court of appeals has once interpreted the contract* existing between the landowner and the city, *that*

> *interpretation becomes a part of the contract, upon which one* acquiring land *may rely,* and *that any subsequent change of it to his injury impairs the obligation of the contract.*" 206 U.S. at 549, 27 S. Ct. at 690. (Emphasis supplied).

The *Muhlker* case, cited in the statement just quoted, was brought to this Court, *not from a lower federal court, but from a state court,* the Supreme Court of New York. The plaintiff based his case on the claim that the state court had made a *change* of rulings in prior New York cases regarding the interpretation of his contract rights as an abutting owner, and that the *change* in interpretation to his injury impaired his contract rights. This Court agreed with plaintiff's claim. The case involved the elevation of a railroad in the street abutting plaintiff's property in such a way as to cut off his light and air, rights said to arise from a contract. These earlier decisions held, *not upon the basis of any statute,* that compensation was due under circumstances such as those that existed in *Muhlker.* Because they prevailed when the contract was made, the *prior state judicial decisions* were read into the contract. This Court held that they had been *altered* and rejected the distinction which the state court had made between them and *Muhlker. The case clearly holds that the previous decisions had been changed and the contract had been impaired not by any state statute but by a change of a state judicial decision.* This Court stated that it is not concerned with the "power of the courts of New York" to modify their decisions and added:

> "Such power cannot be exercised to take away rights which have been acquired by contract and have come under the protection of the Constitution of the United States. *And we determine for*

> *ourselves the existence and extent of such contract.* This is a truism; and *when there is a diversity of state decisions the first in time may constitute the obligation of the contract and the measure of rights under it.* Hence the importance of the *Elevated Railroad Cases* and the doctrine they had pronounced when the plaintiff acquired his property." 197 U.S. at 570, 25 S. Ct. at 528. (Emphasis supplied except for *Elevated Railroad Cases*).

In cases like *Muhlker,* where this Court decides that the state court has *changed* prior interpretation of a contract and that *the change* is violative of the Contract Clause, it should be noted that the *concept of change* does not lack elasticity. If this Court decides that prior decisions have been overlooked by the state court, it must find that the new "law" announced by the state court is not the "law" required by the said Clause. In *Muhlker* then, this Court stated in effect that a "law," as enunciated by a state court, is "law" subject to scrutiny by this Court under that Clause.

If state "law," as declared by a state court in a case which this Court decides involves *change* of interpretation of a contract, can be found by this Court to be "law" impairing the obligation of the contract, it must be on the ground that this Court *differs from the state court* in the application of principles of law concerning interpretation of contracts. Given the differences between contracts and widely diversified legal issues and principles that are involved in deciding what obligations arise from a contract, it is submitted that, if the said Clause does not prevent this Court from taking steps in that wide field, the Clause does not deprive it of jurisdiction to hold that, if the state court erroneously applies general principles of law in inter-

preting the obligations of a contract and thereby impairs them, this Court has jurisdiction to hold that this is a violation of that Clause.

Muhlker was approved and applied in *Birrell* v. *New York and Harlem Railroad Co.*, 198 U.S. 390, 25 S. Ct. 667 (1905).

In a case where this Court is considering the constitutional question of impairment of contracts who is the final arbiter of its right to decide questions such as these: Is there a contract? Has it been interpreted by a state court? Has there been a similar contract interpreted by the courts of that state? Has there been a subsequent *change* by the courts of that state of the interpretation of the contract? Do certain facts or distinctions justify a court's decision concerning the extent of a contract and its concomitant primary or derivative rights? Has a state court overruled its prior decisions? Has a subsequent *change* of interpretation resulted in injury to a party to a contract?

It is respectfully submitted that this Court has not only the right but also the duty, as the court of last resort on constitutional issues, to decide these questions and to decide the issues raised thereby in a case under its consideration. Not only logic and reason require this but this Court has so stated. This is shown by the last-quoted statement from *Muhlker, supra*:

> *"And we determine for ourselves the existence and extent of such contract."* 197 U.S. at 570, 25 S. Ct. at 528. Acc. *Butz, supra; Town of Pana* v. *Bowler*, 107 U.S. 529, 2 S. Ct. 704 (1883).

III. The decision of the Supreme Court of Ohio impaired the obligation of the contract rights of petitioner guaranteed by the Contract Clause by changing the court's long line of decisions in force at the time petitioner's contract was formed, according to which decisions a subcontractor, performing under his contract, is a business invitee, and, by such change, relegating the petitioner to the status of a licensee and holding that, as such, he was not entitled to the rights enjoyed by a business invitee to recover damages for injuries sustained by the subcontractor as a result of the negligence of the general contractor on the premises.

A. The Issue in Point III.

According to the majority of the Supreme Court of Ohio, the question in the instant case is whether the petitioner was a "licensee" or an "invitee" at the time he was injured. Also, according to the majority, the answer to this question as well as the kind of the duty owed by respondent to petitioner, requires the application of principles of common law and general jurisprudence.

In point IV, *infra,* there will be discussed the question whether these principles apply at all in the case at bar since they have been abrogated in Ohio by Sections 4101.11 and 12. In point IV it will also be shown that the majority *changed* prior Ohio law even so far as the said Ohio statute is concerned.

The discussion in this point III would, of course, be germain only if this Court, agreeing with the majority, should hold that the contract obligations here *are governed* by principles of common law.

B. Findings of the Supreme Court of Ohio.

The majority stated its findings as follows:

> "The record does not support the plaintiff's position that his trip to the construction site on Sunday evening was for the benefit of the defendant, or that it was required by his contract with the defendant, or that it was requested by the defendant, or that the defendant had knowledge that he intended to make such a trip. The plaintiff was not a business invitee to this construction site at that time, but a licensee. *Scheurer* v. *Trustees of The Open Bible Church*, 175 Ohio St. 163; *Scheibel* v. *Lipton*, 156 Ohio St. 308; *Keesecker* v. *G. M. McKelvey Co.*, 141 Ohio St. 162, 166." 3 Oh. St. 2d at 172 and *infra*, p. 5a.

Unless otherwise particularized, the statement just quoted, for brevity, will be referred to as the "findings of the majority" or just "findings."

C. Unconstitutionality of the Court's Findings.

It was unconstitutional for the majority to hold that petitioner's trip to the construction site on Sunday evening, hereinafter referred to as the Sunday visit, was not for the benefit of the respondent. This will be shown in point VII, *infra*.

D. Petitioner Was an Invitee at the Time of His Sunday Visit to the Construction Site.

1. The jury's verdict.

The issue whether petitioner was a business invitee on the premises at the time he was injured, Sunday, because he was there for a proper purpose incident to the performance of the subcontract which the respondent had entered into with petitioner was submitted by the trial judge to the jury as a question of fact. The

jury answered this question in the affirmative and the trial court approved the verdict.

Had the trial court considered that there had not been sufficient evidence to go to the jury, it would not have submitted the question of fact to the jury nor would it have approved the verdict and the same can be said about the Court of Appeals so far as the sufficiency of the evidence is concerned. And no one who examines the Statement of Facts, *supra,* and the record evidence therein or in this point III can seriously contend that there had been no facts that could have been left to the jury for decision.

2. The findings of the Court of Appeals.

In regard to the evidence relevant to the purpose of petitioner's Sunday visit and the benefit thereof to the respondent, the Court of Appeals held:

> "There was testimony that the plaintiff was under pressure from the defendant. He, therefore, kept his crew working six days a week with overtime every day of the week. Francis F. Duffy, President of the defendant corporation, testified that his construction supervisor kept a separate sheet of plaintiff's progress and the amount of equipment plaintiff had on the job 'due to the fact that winter was not far away and we wanted to have the work progress so that we could get our foundation in and our steel erected before the very bad weather set.' " 197 N.E. 2d at 400, and *infra,* p. 14a.

And further on:

> "The evidence also establishes that Saturday night, October 6, 1956, it rained hard and that mud caused *by heavy rain* materially affects work of an excavating contractor, *necessitating change*

in the plan and procedure of his work. Plaintiff testified that one of his reasons for going to the premises the day of the accident was to consider the *necessity of such change* and to make arrangements with his foreman so that the work would proceed smoothly Monday morning. There was testimony that it was not uncommon for excavating and grading contractors to visit the premises after normal working hours in order to determine changes and thereby avoid delay." 197 N.E. 2d at 401, and *infra*, p. 16a. (Emphasis supplied).

And still further on:

"After a careful consideration of all the evidence in the light of the applicable principles of law, we are of the opinion that this case was correctly a case for submission to a jury under a proper charge.

"[1] There is a sufficiency of evidence to establish that plaintiff's purpose in being upon the premises was ultimately connected with the proper performance of the subcontract between plaintiff and defendant under the conditions imposed by the defendant upon plaintiff to expedite the work with all due haste. *The evidence establishes a direct pecuniary benefit to defendant by such compliance on the part of the plaintiff.*" 197 N.E. 2d at 403, and *infra*, p. 20a. (Emphasis supplied).

3. The minority of the Supreme Court of Ohio.

With respect to the opinion of the majority, including the issue whether petitioner's Sunday visit was for the benefit of respondent, three of the seven judges dissented from the holding of the majority and stated:

"It appears that the opinion of the majority is somewhat in the nature of an argument upon the facts. This court does not ordinarily weigh the evidence. But, it is my opinion that the factual con-

tentions of the majority opinion are in certain instances disputed by the record. This is true in the area of evidence that it was the duty of appellee to hasten his job to completion so that other phases of the project could be completed, or well along, before bad weather set in. This was for the acknowledged benefit of the appellant.

"The testimony of Mr. Duffey, president of appellant construction company, discloses the following:

'Q. Was there any particular reason why one particular sheet was devoted strictly to Central Excavating Company [Salemi's concern], keeping these kinds of records? A. I——

'Q. It seems to show—it shows their equipment. A. Well, we were interested in the amount of equipment that Central Excavating had on the job, *due to the fact that winter was not far away and we wanted to have the work progress so that we could get our foundation in and our steel erected before the very bad weather set in.*

'Q. In fact, time was somewhat of the essence? A. Yes, it was.

'Q. Wasn't it, in this phase of the work? A. Yes.

'Q. Rather important to get all the excavating work out of the way so that these other people could come in and do their work before your winter set in? A. *That's right.*" (Emphasis added.)

"Mr. Salemi, appellee, who was the Central Excavating Company, had a vast amount of planning to do in order to keep a large amount of equipment, both heavy and light, busy on a large job such as this. In an effort to complete the excavating as soon as possible he worked his men six days a week plus overtime.

"The testimony of Mr. Salemi, appellee, discloses the following:

'Q. Was time a factor in that contract, Mr. Salemi? A. Yes, it was, because we were very

much told that one of the reasons they [appellant] gave us the contract was that they expected us to in plain words hit it hard, and that means to get the job done in a hurry because they had quite a big job to do and *they couldn't do anything unless the excavation was done first,* and November was just around the corner, and so was December, and so *we promised them* [*appellant*] *we would really go at it hard and try to get the job done.*

'Q. How many days a week were your men working? A. On this job, which isn't very common, we worked six days a week and we worked overtime every day.

'Q. You say that was or was not common? A. It was not common. We don't—in other words, I mean we don't work—usually work overtime and on Saturdays unless *there is a definite hurry or some agreement to do it.*" (Emphasis added.)

"In the case at bar there was both urgency required by the approach of bad weather and a definite agreement between the parties that Salemi, appellee, would drive the work as hard as he could and plan accordingly.

"This and other evidence indicates quite clearly that even under the common law petitioner was an invitee of respondent. At least there was ample evidence for the jury to reach such a conclusion.

"For the foregoing reasons, and others that could well be discussed, the judgment of the Court of Appeals should have been affirmed." 3 Oh. St. 2d at 175 and *infra,* p. 8a.

4. The evidence entitled the jury to find that petitioner was a business invitee at the time of his Sunday visit and that the visit was for the benefit of respondent.

With respect to the adequacy of the evidence to support the jury's findings, the Court of Appeals stated:

> "it is our opinion that there is *ample evidence* to support *each question of fact tried by the jury* in the instant case. Further, under the instructions given the jury by the trial court, the jury could well find that it was the breach of duty of the defendant in its failure to protect plaintiff against a foreseeable risk of harm which was the proximate cause of the serious injuries suffered by the plaintiff in the instant case. We are of the opinion that it is *not the function of this court to reweigh the evidence in an attempt to reach a conclusion different from that of the triers of the facts.* It is rather the function of this court to search the record to *see whether there is sufficient evidence for the triers of the facts, exercising judgment of reasonable men,* to come to the conclusion which they did. We conclude *there is such a sufficiency of evidence,* applying the reasonable man test, to justify the findings by the jury in favor of the plaintiff." 197 N.E. 2d at 409, and *infra,* p. 33a. (Emphasis supplied).

The Court of Appeals properly pointed out in this statement that it was not the function of an appellate court *"to reweigh the evidence in an attempt to reach a conclusion different from that of the triers of the facts."* (Emphasis supplied). A reading of the majority opinion of the Supreme Court by this Court will show that this is what the majority improperly did in arriving at its conclusion that petition was not, as the jury had found, a business invitee. The fact that the

majority reweighed the evidence finds support in the following statement by the minority:

> "It appears that the opinion of the majority is somewhat in the nature of an argument upon the facts. This court does not ordinarily weigh the evidence. But, it is my opinion that the factual contentions of the majority opinion are in certain instances disputed by the record." 3 Oh. St. 2d at 175, and *infra,* p. 8a.

The evidence established uncontrovertedly that, if petitioner had not been a subcontractor of respondent, he would have had no purpose and no desire to go to the premises.

The majority stated:

> "It is agreed that the plaintiff was not required by his contract to visit the construction site on a *Sunday evening when no work* was in progress and no other person was present on the premises. It is agreed that no work was done on Sunday. It is agreed that there was no express or implied request by the defendant that plaintiff visit the construction site on Sunday evening at dusk. There is nothing in the record which would indicate that the defendant had any reason to know that the plaintiff would visit the construction site at dusk on that Sunday evening." 3 Oh. St. 2d at 171, and *infra,* p. 3a. (Emphasis supplied).

With all due respect to the majority, the first sentence of the statement just quoted is a misleading half-truth. What the majority should have said was that petitioner's subcontract had no limitations, either as to hours in which to perform the work, or those portions of the premises where he was authorized to perform his work. In other words, the whole truth would be that the contract neither required *nor prohibited*

the Sunday visit. At the beginning of the first sentence the court stated that "It is agreed." If petitioner's understanding is right, this statement would indicate that petitioner had agreed that the contract had not required the visit. But, far from agreeing to such half-truth, petitioner, as appellee before the Supreme Court of Ohio, submitted a brief on page 29 of which he stated what is the whole truth on this point, namely, that petitioner's contract neither required nor prohibited the Sunday visit. It is not disputed from the record that petitioner, as excavating subcontractor, was an independent contractor in his relation to respondent, the general contractor. The very heart of the independent contractor relationship is the independence of control in his own obligations by the independent contractor, the respondent. Obviously, therefore, unless in some manner restricted by his contract, the independent contractor, by that very status, is left free to his manner and method of accomplishing the end result, for which he was hired.

As to the majority's statement that there was "no express or implied request by the defendant that plaintiff visit the construction site on Sunday evening at dusk," the answer is that nothing in the subcontract prohibited petitioner's Sunday visit, nor required of him any additional express or implied authority to make such a visit. As stated above, petitioner was left free in regard to the manner and method of accomplishing the work for which he was hired. The last sentence of the majority's statement quoted above relates to the issue of foreseeability by the respondent of petitioner's visit, an issue which is entirely different from the question whether petitioner was a business invitee at the time of his visit.

Furthermore, the majority's statement ignored the overwhelming record evidence that such visit was not only necessary but customary.

The petitioner testified not only that the visit in question was common but that it was a frequent occurrence for him to go to premises on projects as this after the course of working hours, *or on Sunday,* to inspect the progress of the job because *changed conditions* might change the job layout previously planned (R. 107, B.E. 167). It was a frequent occurrence for petitioner, after the close of working hours, *or on Sunday,* to inspect the progress of jobs (R. 107, B.E. 166). Weather is one of the biggest factors in the earth-moving business (R. 107, B.E. 167). Ernest Connerth, an expert witness, who testified as an experienced construction superintendent, stated that heavy rain generally *does change* the course or plan of grading and excavating job (R. 369, B.E. 640). He personally experienced several instances of going on premises to inspect the field *after normal construction hours* (R. 369, B.E. 640). Petitioner testified that the chief reason for going to the premises that evening was on account of the rain that had happened the Saturday night and Sunday morning immediately preceding the Sunday visit, and if it had not been for the rain, *it would not have been necessary for him* to go on the premises (R. 159-160, B.E. 249). It is thus clear that petitioner was on the premises pursuant to his subcontract to keep the job running smoothly, a matter in which respondent had a vital interest (R. 164, B.E. 256). In the light of this evidence, it was an error on the part of the majority to conclude that the Sunday visit was not made by petitioner in performance of his work under the subcontract:

> "It appears that the plaintiff went to the construction site at dusk on Sunday evening for his own benefit. This is substantiated by his testimony that, *if the rain had been heavy enough to prevent efficient work the following day,* he could call the person from whom he rented the equipment and request that no men be sent to the job the next morning, thus saving himself the cost of renting the equipment for that day and the cost of wages of the men." 3 Oh. St. 2d at 172, and *infra,* p. 4a. (Emphasis supplied).

Even if one considers all the "benefits" to petitioner the majority sees fit to mention in the statement just quoted, those "benefits" depended on petitioner's finding on his Sunday visit to the site that, as the majority said in that statement, *"the rain had been heavy enough to prevent efficient work the following day,"* Monday. In reaching its conclusion in the statement just quoted, the majority overlooks the fact that its own statement *necessarily implies* that petitioner could have found out that "the rain had *NOT* been heavy enough to prevent efficient work the following day." The majority also ignores the fact that *petitioner could not, of course, find out whether the rain had or had not been heavy enough to prevent efficient work without visiting the site in question. And it cannot, of course, be denied that to find whether the work could continue on Monday was part of his work under the subcontract.* As a matter of fact, the respondent's own witness, Kenneth Olson, the respondent's job superintendent, testified that *in heavy mud* it would not be possible to do much grading and excavating, but under certain circumstances you can *take off a skim of mud and continue to work* (R. 234, B.E. 368). Petitioner, as an expert excavator, was certainly justified in going to

the premises on Sunday to determine at least whether a *"skim of mud"* could be taken off so as to allow him to continue work on Monday. *This certainly was performance of work by petitioner under his subcontract.*

Mr. Duffy himself, President of respondent corporation, frankly testified that his people could do very little until petitioner's work was finished (R. 48-49, B.E. 64-65). Petitioner explained that earth moving is a specialty job *requiring changes during the progress of the job* (R. 85, B.E. 133). Petitioner, in good faith, felt it necessary to inspect these premises after the rain, before Monday's work commenced, because they were anxious to get the job done in a hurry and he had that agreement with Duffy to hit this job pretty hard and every little bit counts (R. 162, B.E. 253). Although Salemi conceded that Duffy would not pay him one cent more under his contract by reason of lost time, the lost time would be to the financial detriment of Duffy because it would set Duffy back in his work (R. 164, B.E. 256). Most important, Salemi testified that, for his type of work, if certain jobs can be done at a particular time that the weather was good to do the job, it would be possible to save several days (R. 162, B.E. 252-253). Even Mr. Olson, respondent's job superintendent, testified that at this particular time Salemi was working six (6) days a week, that it was Olson's duty to be there while such activity was going on, that Duffy was anxious during this period of time to get the grading and excavation work done *as quickly as possible* so that the other trades could come in and work, and that one of the reasons they were working six days a week was to get as much done as possible *as soon as they could* (R. 217-218, B.E. 341-342). Keeping in mind the testimony already alluded to through

Mr. T. S. Gindroz, respondent's comptroller, about the direct financial advantages to Duffy through the savings clause in their guaranteed maximum contract with General Electric, which clause is in this record (R. 441), it is readily apparent that *it was important to Duffy not to have any foul-up that Monday morning.*

In *Hendrickson, County Judge* v. *Apperson,* 245 U.S. 105, 114, 38 S.Ct. 44, 46 (1917), the Court stated:

> "Actual conditions cannot be ignored, and certainly we ought not, through assumptions out of harmony with patent facts and overnice refinements, to facilitate the practical destruction of admitted legal obligations."

One has to read the majority opinion and compare it with the above-mentioned record evidence and the dissenting opinion to appreciate that "actual conditions" were really "ignored" by the majority and that "assumptions out of harmony with patent facts" and "overnice refinements" were indulged in by the majority in its opinion. The majority states that "no work was being performed" on the Sunday evening when petitioner went to the construction site. Pertinent evidence relating to this point has been discussed above but it may not be irrelevant to observe that part of a contract is the "integrity" of the parties. It is an implied part of the contract. Can it be said that government officials, including members of this Court, going to their offices after normal business hours to arrange the work for the next day are not performing their work even if there is no specific requirement other than their integrity and conscientiousness?

In *W. B. Worthen Co., et al.* v. *Thomas,* 292 U.S. 426, 432, 54 S.Ct. 816, 818 (1934), the Court quoted the

following statement by Chief Justice Marshall, in *Sturges* v. *Crowninshield,* 4 Wheat. 122, 198, 4 L.Ed. 529 (1819):

> "It is not true that the parties have in view only the property in possession when the contract is formed, or that its obligation does not extend to future acquisitions. *Industry, talents, and integrity,* constitute a fund which is as confidently trusted as property itself." (Emphasis supplied).

The holding of the majority that the petitioner was on the premises for his own benefit naturally applies to all independent contractors. Every businessman expects to profit from his contracts. Merely because a businessman takes active measures to avoid unnecessary expenses in the use of his labor force and equipment should not deprive him of his fundamental right to be free from unreasonable risk of physical harm in the performance of the contractual purpose. As long as the purpose of the visit is related to the business purposes to be served by petitioner's contract, he should be accorded the legislative and common law protections of the standard of ordinary care. In 39 Oh. Jur. 2d 563, Section 51, it is stated:

> "Thus, an employee of an independent contractor, while engaged in the erection of a building upon premises, is a business visitor or invitee of the owner upon the premises in question, and not a licensee."

To take the position advocated by respondent in this case, a subcontractor becomes a licensee merely because he is attempting to make a profit from his subcontract by finding a more expeditious or economical method to perform his subcontract. To the business world, such a proposition would seem incredulous!

The Restatement of Torts, Section 332, defines a business visitor as follows:

> "A business visitor is a person who is invited or permitted to enter or remain on land in the possession of another for a purpose directly *or indirectly* connected with business dealings between them." (Emphasis supplied).

Further explanation under subparagraph "c" states:

> "It is not necessary that the visitor's purpose be to enter into immediate business dealings with the possessor. The benefit to the possessor may be indirect and in the future."

It must further be observed that petitioner's *subcontract had no limitations, either as to hours in which to perform the work, or those portions of the premises where he was authorized to perform his work.* In other words, Duffy wanted petitioner to get the job done as quickly as possible, and did not care when, where, or how he did it, so long as it was done. One can readily imagine, in view of the testimony of both Mr. Duffy and Mr. Olson, as to what their attitude would have been toward petitioner if the work schedule was all fouled-up on Monday morning due *to surface mud, and a bunch of men standing around with their equipment and no idea as to what to do.* One cannot help but wonder whether Mr. Duffy and Mr. Olson, under such circumstances, would not have given petitioner a good dressing down for not being on the job, and getting out there sometime the preceding Sunday night so that he could re-arrange his work schedule to the extent necessary to keep things running smoothly, instead of tying up expensive men and machinery and holding up the job (R. 104, B.E. 162-163).

Southern Railway Co. v. *Melton,* 240 Ala. 244, 198 So. 588 (1940), involved the death of a railroad inspector resulting from an automobile-train collision at a place where he had a duty to make inspection on track used in interstate commerce. He had been furnished with a *motor car* but was not forbidden to use an *automobile.* In leaving to the jury the question whether he was then engaged in interstate commerce, the fact that he had not used a *motor car* was not held to bar recovery for his death. In addition to the evidence in the case at bar, by analogy to *Southern Railway Co.,* petitioner's not being forbidden by the contract to go to the construction site on Sunday, his visit there on that day for the purpose of the contract could not bar his recovery.

It is not reasonable to believe that an independent contractor would enter into an excavating contract burdened with the conditions (1) that he would not be able to decide whether certain phases of the work under the contract would require him, as a prudent man (e.g., after a *heavy rain* necessitating possible changes in schedule), *to visit* the site to be excavated; (2) that such visit would have to be made only during the *usual working* hours; or (3) that such visit would have to be *required* by the general contractor. A construction of the contract having that effect should be adopted only when no other is possible. But even if all those conditions were part of the contract, *the jury* found not only that petitioner's visit was in performance of work under his contract with the respondent, but that it was also *for the benefit of the respondent.*

Not only the record evidence referred to in this point III but also the record evidence mentioned in the Statement of Facts, *supra,* leads to the conclusion that,

under the circumstances of this case, petitioner was a business invitee at the time of his Sunday visit to the cite and that it was to the benefit of respondent and petitioner to visit the premises at the time and place of his injury. The only interest of the general contractor, the respondent, is accomplishment of the end result. 27 Am. Jur. 486, Sec. 6 *et seq.*, 28 Oh. Jur. 2d 337, Sec. 4. By hiring an independent contractor, rather than a subordinate employee, to do the excavating, respondent must certainly be held to have petitioner exercise independent judgment in his own operations regarding method and manner of accomplishing respondent's end result, for which he was hired.

5. The majority decision changed the Ohio Supreme Court's long line of decisions in force at the time petitioner's subcontract was formed according to which earlier decisions, a subcontractor, petitioner, performing under his contract, is a business invitee.

There is a long line of judicial decisions of the Supreme Court of Ohio itself which hold that, when an independent contractor is engaged to construct improvements on the premises, such independent contractor is there at the implied request of the owner or occupier, and has the status of an invitee to whom the owner or occupier owes the duty of ordinary care to avoid injuring him. This was the unquestioned law in Ohio for years prior to, and at the time of, the entry of petitioner and respondent in this subcontract. See *Hozian* v. *Crucible Steel Casting Co.*, 132 Oh. St. 453, 9 N.E. 2d 143 (1937), paragraph 3 of the Syllabus; *Bosjnak* v. *Superior Sheet Steel Co.*, 145 Oh. St. 538, 62 N.E. 2d 305 (1945), paragraph 1 of the Syllabus; *Schwarz* v. *General Electric Realty Corp.*, 163 Oh. St. 354, 126 N.E. 2d 906 (1955), paragraph 1 of the Syllabus; *Davis* v. *Charles Shutrump and Sons*, 140 Oh. St.

89, 42 N.E. 2d 663 (1942), paragraph 1 of the Syllabus. That this rule is followed nationally, see "General Contractor's Liability to Employees of Other Contractors on the Project," 20 A.L.R. 2d 868, *et seq.*

Nowhere can authority be found for the proposition that an independent contractor entering premises under the control of the general contractor for a business purpose related to the contract is relegated to the status of a licensee. The majority cites no such authority in support of its relegating petition to the status of a licensee. It is not an unreasonable assumption that it failed to do so because no such authority can be found. The majority cites not a single case dealing with the independent contractor relationship or, for that matter, *any contractual relationship,* but instead, cites the following cases the pertinency of which to an independent contractor's relationship, with all due respect to the majority, escapes petitioner:

Scheurer v. *Trustees of Open Bible Church,* 175 Oh. St. 163, 192 N.E. 2d 38 (1963), involving injury to a policeman entering under color and authority of law rather than contract; *Scheibel* v. *Lipton,* 156 Oh. St. 308, 102 N.E. 2d 453 (1951), concerning a social guest who was not even on the portion of the premises consistent with the invitation at the time of injury; *Keesecker* v. *G. M. McKelvey Co.,* 141 Oh. St. 162, 47 N.E. 2d 211 (1943), in which the question before the court was whether a certain delivery man in causing a child to be injured had trespassed upon the property under the circumstances.

Petitioner is constrained to note that Judge Zimmerman, writing for the majority of the court in *Keesecker,* defined a licensee as one "who stands in *no*

contractual relationship to the owner or occupier of premises, but is permitted or tolerated thereon, expressly, impliedly or inferentially, merely for his own interest, convenience or pleasure or for that of a third person." (Emphasis supplied). Was the majority abandoning this classical definition of licensee to enlarge its scope to encompass contractees?

Further precedents were cited by the Court of Appeals:

> "There is an abundance of authority that one working under a *subcontract visiting construction premises for a proper purpose concerned with the performance of that contract enjoys the status of a business visitor* as to the person in general control of the premises. There was no dispute in this case but that the defendant was in general control of the premises. In 39 Ohio Jurisprudence 2d 563, Negligence, Section 51, it is stated:
>
> > 'According to the Supreme Court, an "invitee," in tort law, means a business visitor, that is, one *rightfully* on the premises of another *for purposes* in which the possessor of the premises has *a beneficial interest.* * * *'
>
> "See *Scheibel* v. *Lipton,* 156 Oh. St. 308, 102 N.E. 2d 453.
>
> "The plaintiff as a subcontractor doing business as an individual proprietor enjoys the same rights as a business visitor. See also McGeary v. Read, 105 Ohio App. 111, 151 N. E. 2d 789; Joyce v. Union Carbide & Carbon Corp., 114 Ohio App. 51, 173 N. E. 2d 692." 197 N. E. 2d at 403 and *infra,* p. 21a. (Emphasis supplied.)

In the light of the numerous pre-majority Ohio precedents, which, being in force at the time of the

formation of the contract in this case became thereby part thereof, all of them dealing with the independent contractual relationship, that one who enters premises under color of right from a written contract in that relationship is entitled to the protection accorded a business invitee, the decision of the majority in this case, by *changing* the law established by those precedents, impaired the contract rights of petitioner in violation of the Contract Clause of the Constitution.

In *Gelpcke, supra,* it was held that the law, as declared in state court decisions at the time a contract is formed becomes part thereof. See also quotation from *Von Hoffman, infra,* p. 91. It may also be added that never before has a contractee been required to prove that at the moment of injury he was conferring a specific advantage on the invitor to be entitled to the rights of an invitee since the overall business purpose to be accomplished by the contract provides the purpose.

E. The Majority's Taking Away of Petitioner's Remedial Contract Right as a Business Invitee under Pre-majority Law Unconstitutionally Impaired His Contract with Respondent.

The question before this Court in the case at bar is whether or not it is of the opinion that, prior to the majority decision, Ohio courts had interpreted Ohio law to be that a contractor performing under his contract is a business invitee. Should this Court so decide, it would follow, from the cases mentioned in point II, *supra,* that, although the particular contract of petitioner had not been before the Supreme Court of Ohio prior to this case, there has been an unconstitutional impairment of the remedial contract rights of petitioner by the majority's *changing* the law enun-

ciated in earlier Ohio judicial decisions so far as contractual remedies of business invitees are concerned.

Obligations under a contract depend not only on the provisions contained therein but also on the legal remedial rights available to one whose rights are based on those obligations. Contract rights can exist juridically only in the actionability of their violations. If a court dispenses with the remedies incident to a contract (here petitioner's remedy as a business invitee under the contract), it thereby impairs the contract rights.

By holding that petitioner was not a business invitee (as such he would have undoubtedly the right to recover damages for his injury due to respondent's negligence) and relegating him to the status of a licensee (to whom petitioner's duty of care is limited, according to the majority, to willful or wanton misconduct or an affirmative act of negligence), the majority denied him a *remedy* to which he was entitled under the contract because of his right to be treated thereunder as a business invitee.

If this Court differs from the majority and holds that, under the contract here, petitioner, at the time of his Sunday visit to the site, was a business invitee, according to prior Ohio decisions, the consequence of this Court's holding would be that the majority's denial of the remedy to the petitioner as an invitee was improper. The denial of remedies to which a party to a contract is entitled—in the case at bar the remedy of a business invitee—constitutes a violation of the Contract Clause. If this Court finds that the law of Ohio, prior to the majority opinion, either common law or Sections 4101.11 and 12, gave to a party having the contractual relation of the petitioner a remedy

as a business invitee or as a frequenter, then the decision of the majority, by denying him such a remedy, impaired his contract rights and thereby violated his rights under the Contract Clause. This was clearly stated in the *Butz* case, *supra*:

> "The act of 1852 and the provisions of the code were in force at that time, and entered into and formed a part of the contract of the parties. They prescribed one of the *remedies* to which the bondholders were entitled in the event of default by the City. It has been uniformly held by this court that such *remedies* are within the protection of the Constitution of the United States, and that *any state law which substantially impairs them is as much prohibited by that instrument as legislation which impairs* otherwise the obligation of the contract. [Bronson v. Kinzie, 1 How. 311; McCracken v. Hayward, 2 How. 608.] *If the remedy be taken away the contract is in effect annulled.*" 8 Wall. at 583. (Emphasis supplied).

In the case of *William C. Murray, supra,* it was stated:

> "The obligation of a contract depends upon its terms and the *means which the law in existence at the time affords for its enforcement.* A law which alters the terms of a contract, by imposing new conditions, or dispensing with those expressed, is a law which impairs its obligation." 96 U.S. at 448, 24 L.Ed at 764. (Emphasis supplied).

In *Hendrickson, County Judge* v. *Apperson, supra,* 245 U.S. at 112, 38 S.Ct. at 45, the question involved was the construction by Kentucky courts of a state statute. This Court held that this construction "would impair" contract rights "upon which respondent has a right to rely," and that this construction could not, therefore, be permitted to defeat a remedy available

to the defendant. After stating that, "The doctrine of this court here to be applied has long been established," this Court quoted from *Von Hoffman* v. *The City of Quincy*, 4 Wall. 535, 550, 552, 553, 18 L.Ed. 403, 408, 409 (1867):

> "'*It is also settled that the laws which subsist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it, as if they were expressly referred to or incorporated in its terms. This principle embraces alike those which affect its validity, construction, discharge,* and *enforcement.* * * * *Nothing can be more material to the obligation than the means of enforcement.* Without the remedy the contract may, indeed, in the sense of the law, be said not to exist, and its obligation to fall within the class of those moral and social duties which depend for their fulfillment wholly upon the will of the individual. *The ideas of validity and remedy are inseparable, and both are parts of the obligation, which is guaranteed by the Constitution against invasion.* The obligation of a contract "is the law which binds the parties to perform their agreement." The prohibition has no reference to the degree of impairment. The largest and least are alike forbidden. * * * It is competent for the states to change the form of the remedy, or to modify it otherwise, as they may see fit, provided no substantial right secured by the contract is thereby impaired. No attempt has been made to fix definitely the line between alterations of the remedy, which are to be deemed legitimate, and those which, *under the form of modifying the remedy, impair substantial rights. Every case must be determined upon its own circumstances.* Whenever the result last mentioned is produced the act is within the prohibition of the Constitution and to that extent void.'" (Emphasis supplied).

Even if the language of the majority is construed as "modifying the remedy" there is no doubt that it does "impair substantial rights" of petitioner by depriving him of those substantial rights which, as a result of his contract, he does have under the pre-majority Ohio common law as well as the statutory law of Sections 4101.11 and 12.

Does the fact that the remedy in the case at bar was denied to petitioner not by a legislative act but by a state judicial decision oblige this Court to affirm the judgment of the Ohio court? The answer is no. In the *Butz* case, the Court stated:

> "Here the remedy is taken away; not by a subsequent repeal, but *by subsequent judicial decisions.* The effect upon the contract is *the same as if the provisions of the Code had been repealed.* This court construes *all contracts* brought before it for consideration, and in doing so its action is *independent of that of the state courts,* which may have exercised their judgment upon the same subject. [Swift v. Tyson, 16 Peters 19]. This is one of the functions we are called upon to perform in this case. The fact that one of the elements in the case is a statute of the State does affect the legal result. [Jefferson Branch of the State Bank v. Skelley, 1 Black 436]." 8 Wall. at 584. (Emphasis supplied.)

In *Butz,* this Court decided that if state law gives a *remedy* at the time a contract is made—in the case at bar the remedy that belongs to a contractual business invitee—that remedy cannot be taken away by a *subsequent judicial decision,* as done here by the majority, *without violating the Contract Clause.* As shown in point III, *supra,* petitioner, under his contract, had a remedy for his injuries as a business invitee. If

this Court agrees with that point it must also decide that the majority judgment must be reversed.

F. This Court Is Free To Determine for Itself, Independently of the Opinion of the Majority, Both the Contract Rights of Petitioner, So Far as Their Unconstitutional Impairment Is Concerned, and the Application by the Majority of General Principles of Common Law and Jurisprudence in Relation to Those Rights.

Is this Court bound to accept the majority's construction and interpretation of the contract rights and remedies in this case in relation to (a) common law (b) the law of 4101.11 and 12? The answer is no. In cases of impairment of contract, this Court exercises its own judgment as to the construction of state constitutions, statutes and general principles of jurisprudence as well as to the existence or nonexistence of a contract or a contract right irrespective of any contrary decisions of state courts on those points. This principle was first announced by this Court in *Swift* v. *Tyson,* 16 Pet. 1, 19 (1842):

> "Undoubtedly the decisions of local tribunals upon such subjects are entitled to, and will receive, the most deliberate attention and respect of this court; but they cannot furnish positive rules, or conclusive authority, by which our judgments are to be bound up and governed."

In *Butz, supra,* a case brought before this Court by a writ of error to the Circuit Court of the United States for the District of Iowa, the facts were as follows. In 1867, the petitioner had recovered a judgment against the City of Muscatine for the principal and interest of a bond executed by the city in 1854. An execution had been issued and had been returned "no property found." It was the duty of the mayor to levy and collect taxes whereby to pay such judgments when recovered. The city defended on the

ground that, under the statute of Iowa of January 22, 1852, it was not permitted to levy or collect a tax exceeding 1% upon the taxable property of the city. With respect to the bonds which it considered a contract between the plaintiff and defendants, this Court, in granting to the plaintiff a writ of mandamus for the levying of the tax, disagreed with the construction of the aforesaid Iowa statute by the Iowa courts and held that the act of 1852 did not prevent the city from levying a tax.

It was suggested on the part of the defendant, the City of Muscatine, that this Court was obliged to accept the interpretation of the provisions of the code involved in that case which had been given to them by the highest court of the state. This Court, after admitting that "several adjudications" of the state statutes by the Supreme Court of Iowa were adverse to the views of this Court, stated:

> "It is alike the duty of that court and of this to decide the questions involved in this class of cases, as in all others, when presented for decision. This duty carries with it investigation, reflection, and the exercise of judgment. It cannot be performed on our part, by blindly following in the footsteps of others and substituting their judgment for our own.
>
> "Were we to accept such a solution we should abdicate the performance of a solemn duty, betray a sacred trust committed to our charge, and defeat the wise and provident policy of the Constitution which called this court into existence.
>
> "The defendants in error have not submitted any brief or argument. We have had no assistance from them in this way. But it has been suggested in their behalf that we are concluded by the more limited interpretation of the provisions of the code which have been given to them by the Supreme Court of the State.

"To this we think there are several answers:

1. In all the cases brought here under the 25th section of the Judiciary Act this court has never hesitated to determine for itself the construction and effect of any statute of a State, brought under review, without reference to the previous adjudications of the highest court of the State upon the subject." 8 Wall. at 582.

The *Butz* case decides that this Court may interpret a state statute differently from a state court. The reasoning of that case is based on the fact that the duty of this Court in deciding questions involving contracts and their remedies "carries with it investigation, reflection, and the exercise of judgment. It cannot be performed on our part, by blindly following in the footsteps of others and substituting their judgment for our own."

The part of the majority opinion which did not deal with the statutory provisions of 4101.11 and 12 involved general principles of common law. It is not logical to believe that the duty referred to in *Butz* applies only to state courts' decisions regarding state statutes but not to those decisions when they involve law based not on statutes but on common law principles. As a matter of fact, in *Township of Pine Grove* v. *Talcott,* 19 Wall. 666, 667, the fact that this Court has the same duty and freedom as to common law was expressed quite clearly. The Court said:

"The question before us belongs to the domain of general jurisprudence. In this class of cases this court is not bound by the judgment of the courts of the states where the cases arise."

The opinion of the majority which holds that petitioner was not a business invitee involves questions of general jurisprudence. Under common law principles

petitioner was a business invitee at the time of his Sunday visit to the premises. This has already been shown in point III, D, *supra.*

In cases involving impairment of contracts, this Court will determine for itself whether contract rights exist notwithstanding a state judicial decision that no such rights exist. *Town of Venice* v. *Murdock,* 92 U.S. 494, 23 L.Ed. 583 (1876); *Town of Pana* v. *Bowler, supra.* In *Muhlker, supra,* it was stated: "And we determine for ourselves the existence and extent of such contract," 197 U.S. at 570, 25 S.Ct. at 528.

In *Great Southern Fire Proof Hotel Co.* v. *Jones, supra,* 193 U.S. at 548, 24 S.Ct. at 580, a case involving an Ohio statute, this Court held that state judicial decisions on state law are not conclusive on this Court in impairment of contract cases if those decisions are rendered after the rights of the parties "had been fixed by their contracts."

It may be contended by the respondent that this Court has the right to disagree with a state court's interpretation of state law only when the case comes to this Court from a lower federal court. This is not so. In *Butz, supra,* the Court stated:

> "In the opinion delivered in the case of the Jefferson Branch of the State Bank of Ohio v. Skelley, [1 Black 436] it was well asked of what value would the appellate power of this court be to the party aggrieved, if such were not the rule. In that case and in all the other cases brought here, involving the same question, *an Act of the Legislature of Ohio was pronounced invalid,* and the judgments of the Supreme Court of the State were reversed. Cases may be brought here from the circuit court of such a character that it is necessary to the *right administration of justice that we should proceed upon the same principle in deciding them.* Indeed, questions which are identi-

cal, may be brought here in *both ways*. Under such circumstances *it will hardly be insisted that state adjudications are to control in one case and not in the other. Our duty depends upon the questions involved, and not upon the channel through which the case comes before us.*" 8 Wall. at 582 (Emphasis supplied). See also discussion in point I, *supra*, of the question regarding cases coming from state courts.

As to decisions of this Court regarding changes of contract interpretation in earlier state decisions by later ones, respondent may possibly contend that there has been *no change* in interpretation in the case at bar. Even if this be conceded, *arguendo*, it does not mean that this Court, if it finds the majority interpretation violative of the contract, has no right to declare so. The question that would arise by such contention by respondent would be: Could a state court decision invalidating contract rights be held by this Court to impair unconstitutionally *where there has not been a previous ruling by a state court on that point?* The answer is yes.

In *Township of Pine Grove* v. *Talcott, supra,* the contract involved was in the form of bonds which had been issued by the township in aid of a railroad. The Supreme Court of Michigan held them invalid on the ground that the state statute violated the state constitution since the legislature could authorize no tax except for a public purpose. *There had been no previous court decision* interpreting the Michigan Constitution on this point. This Court held that this interpretation *by a state court* violated the Contract Clause. There had also been *no prior state judicial decisions* in the following cases involving impairment of contracts: *Folsom* v. *Township Ninety-six, supra; Board of Commissioners of Stanly County* v. *W. N. Coler and Co., supra.*

And what is also important is that in *Talcott, supra,* the Court stated clearly that the obligation of contracts could not be constitutionally impaired by a state judicial decision any more than by state legislation. Furthermore, this Court disagreed in *Talcott* with the Michigan court's interpretation of the Michigan Constitution as "not satisfactory to our minds" (as this Court may well say with respect to the interpretation by the majority regarding either the common law appiled by it or 4101.11 and 12) and found the Michigan statute to be constitutional and the bonds to be valid. The Court said:

> "The National Constitution forbids the states to pass laws impairing the obligation of contracts. In cases properly brought before us that end can be accomplished unwarrantably *no more by judicial decisions than by legislation.*" 19 Wall. at 678. (Emphasis supplied.)

Here is then as clear a statement by this Court—and it is submitted as sound a decision as can be—judicially interpreting the Contract Clause to be susceptible of violation not only by state "legislation" but by state "judicial decision," and all this even in a case involving the application of state law by a state court. Also, *Talcott* holds that this Court can review a judgment of a state court if the judgment impairs the obligation of contracts.

Conclusion

The reasons set out in this point establish the following:

1. Petitioner, as an independent contractor entering premises under the control of the general contractor for a purpose incident to and related to the

contract between them, enjoys the right of a business invitee by virtue of a long list of decisions by the Supreme Court of Ohio prior to the rendition of the majority judgment in the case at bar.

2. The prior decisions, being in force at the time the contract between petitioner and respondent was formed, became by implication part thereof.

3. The majority impaired the obligation of the contract rights of petitioner unconstitutionally by *changing* its long line of decisions in force at the time petitoner's contract was formed, according to which decisions petitioner, performng under his contract, had a remedial right under the contract to be treated as a business invitee.

4. As succinctly stated in *Butz, supra,* p. 90, denial of a remedy impairs a contract under the Contract Clause because, "If the remedy be taken away the contract is in effect annulled."

5. So far as unconstitutional impairment of the contract in question is concerned, this Court is free to determine independently of the majority both the contract rights and obligations involved here as well as the application by the majority of general principles of common law and jurisprudence in relation to those rights.

In brief, the majority, by *changing* prior state judicial decisions and thereby holding that petitioner was not, under his contract, a business invitee entitled, as such, to recover damages for his injuries, unconstitutionally impaired petitioner's contract rights. The judgment should be reversed.

IV. The majority impaired the obligation of the contract rights of petitioner guaranteed by the Contract Clause by changing prior Ohio law, so far as Sections 4101.11 and 4101.12 of the Ohio Revised Code are concerned, and holding that, although entering the premises in the performance of his contract for purposes related thereto, petitioner was not a "frequenter" within the provisions of those Sections.

Preliminary Statement

The discussion in this point would, of course, be germane only if this Court should agree with the minority of the Supreme Court of Ohio and hold that petitioner's contract rights are governed by 4101.11 and 12, the "frequenter" statute.

1. Findings of the majority.

The only statement of the majority regarding 4101.11 and 12 is the following:

> "The plaintiff makes no contention that the defendant was liable under Sections 4101.11 and 4101.12 of the Revised Code (frequenter statutes). Plaintiff makes no claim that he was a frequenter.
>
> "Sections 4101.11 and 4101.12, *supra*, are not applicable in this case. The premises were obviously not a place of employment on Sunday evening. No work was being performed." 3 Oh.St. 2d at 171 and *infra*, p. 4a.

2. Minority's views.

With respect to this issue, the applicability of 4101.11 and 12, there follows, for convenient reference, the pertinent parts of the minority opinion:

> "The question here, as stated in the majority opinion, is whether appellee was a 'licensee' or an 'invitee' at the time when he was injured. The answer to this question as well as the determina-

tion of the duty owed by appellant, the construction company, to the appellee, according to the majority opinion, requires the application of principles of the common law. However, the General Assembly enacted Sections 4101.11 and 4101.12 of the Revised Code and thereby, in plain and definite language, abrogated the common law and defined the duty owed by appellant to appellee by statutory enactment."

* * * * * * * * *

"No reference, directly or indirectly, is made in these statutes to invitees or licensees. Such terms are not material in the application of the statutes. When the common law contravenes a statute, the common law must yield. This is axiomatic.

9 Ohio Jurisprudence 2d 558, Section 7, reads in part as follows:

"Ohio courts have naturally *always* upheld the precedence of the statutes enacted by the Legislature when the question at issue concerned *some principle of the common law* seemingly in contravention of the legal provisions, but sought to be enforced by one of the parties." (Emphasis added.)

The principle just quoted applies quite precisely to the case at bar. There a party sought to support his position by reference to the common law; here the appellant is endeavoring to do the same thing. There the principles of the common law were in contravention of the statute; here is precisely the same situation. There the courts ruled that the common law was not applicable and that the statutes must prevail; here the same result should have been reached by the majority.

The term, "frequenter," as used in the quoted statutes, *supra,* includes a subcontractor. In substance, a "frequenter" means one who frequents, one who often or habitually visits or resorts to a place. Consequently, the appellee here, as a sub-

contractor, is a "frequenter" within the provisions of safeplace statutes requiring employers to furnish a safe place of employment. *Frankovis* v. *Klug & Smith Co.*, 275 Wis. 156, 81 N. W. 2d 495; *Williams* v. *International Oil Co.*, 267 Wis. 227, 64 N. W. 2d 817.

It follows, therefore, that the majority opinion, being based upon common-law principles which have been abrogated by statute, is not supported by sound legal principles."

* * * * * * * * *

"It seems apparent that the negligence of the appellant was generated from its failure to adopt the safety precautions required by Sections 4101.11 and 4101.12 of the Revised Code, *supra.*" 3 Oh. St. 2d at 173, 174 and *infra*, p. 6a.

3. The petitioner was a frequenter under Sections 4101.11 and 12 at the time of his Sunday visit to the construction site.

It is true that petitioner did not, in his brief, or oral argument, raise a question as to the applicability of the frequenter statute in support of the judgment on review by the Supreme Court of Ohio. The reason for this was that it had never been held in Ohio before that an independent contractor entering the premises for a business purpose arising out of an incident to his contract was not entitled to the common law duties owed to a contractual business invitee.

However, pursuant to Rule IX of the Rules of Practice of the Supreme Court of Ohio, *supra*, p. 6, which permits the raising of an isssue not already raised for the purpose of determining the propriety of the judgment rendered, petitioner, on page 6 of his Motion for Rehearing before that court, did make the contention that, "if the common law status of business invitee is to be denied him [the petitioner], it

compounds the error to take away the statutory protection accorded a frequenter." Even if petitioner had not relied on 4101.11 and 12, the majority, which stated that these sections were inapplicable, was obviously aware of their being involved, and, in any case, should not, by *changing* prior law as to their applicability vis-a-vis the abrogated common law, have impaired petitioner's contract rights in violation of the Contract Clause.

Section 4101.01(a) defines "place of employment" and clearly applies to construction premises. Nowhere in (A) does the statute require that work be actually in process at the moment of injury. Furthermore, *the premises were a place of employment on Sunday evening to the petitioner and work was being performed by him in those premises at the time of his Sunday visit,* since he went there on Sunday solely in his status as excavating contractor in connection with work to be performed the following Monday arising out of the contract between him and respondent. Certainly as to respondent, petitioner was in a place of employment under circumstances which rendered him other than a trespasser, and if, therefore, he was not a business invitee, he was at least a *frequenter*. See Ohio Revised Code, Section 4101.01(E), *supra,* p. 5. As such, he, therefore, was clearly entitled to the duties of a safe place to work imposed by statute for the protection of frequenters as defined in Sections 4101.11 and 12. To deprive petitioner of his right as a business invitee, a right always accorded an independent contractor in the past by a long line of pre-majority decisions of the Supreme Court of Ohio, coupled with a deprivation of his statutory status as a frequenter, is virtually to deprive him of all color of authority

to enter the premises, despite his written contract clearly authorizing such an entry without instructions as to time and place.

With respect to the applicability of 4101.11 and 12, the majority impaired the contract rights of petitioner by holding that he was not a frequenter under those statutes. The minority in the case *sub judice* points out that, under Ohio law in effect *prior to the majority's decision,* 4101.11 and 12 would have been interpreted as having repealed the common law applied by the majority to the obligations and rights under the contract between petitioner and respondent. In other words, those sections, prior to the majority opinion, had made inapplicable the common law principles on the basis of which the majority found that petitioner was not a business invitee. As the minority pointed out, this was the *intent* of the legislature in enacting those Sections. Should this Court agree with the minority—and this is petitioner's position—it should hold that the majority's contrary interpretation in relation to the statutory repeal of the common law not only vitiated the *intent* of the statute but also impaired petitioner's contract right to be regarded as a "frequenter," under 4101.11 and 12, at the time of his injury. This right, according to the minority, petitioner had under Ohio law *prior to the change* of interpretation of the statutory provisions of 4101.11 and 12 by the majority's decision. Since the prior law prevailed at the time petitioner's contract was formed, that law became part of it—see cases *supra,* p. 91, and the majority's *change* of interpretation of that law, which had as a consequence the denial of his contract *remedy* as a frequenter, was an impairment of his contract. We have seen that a denial of a remedy amounts to impairment. See *supra,* p. 88 et seq.

This Court can agree with the opinion of the minority in the case at bar that 4101.11 and 12, either expressly or impliedly, include a person who, like the petitioner, "often or habitually visits or resorts to a place." 3 Oh. St. 2d at 174 and *infra,* p. 8a. In *United States* v. *Babbit, et al.,* 1 Black 55, 61 (1862), it was stated: "What is *implied in a statute,* pleading, *contract,* or will, is as much a part of it as what is expressed," citing several cases. (Emphasis supplied.)

It would require very cogent considerations to make this Court arrive at a conclusion different from the one expressed by the minority when it stated that the word "frequenter" means what the minority says it means. Undoubtedly, the Ohio legislature did not intend by the word "frequenter" in the statute to produce by its action a condition of things in Ohio whereby a contractor such as the petitioner, who has to go to a place of business frequently, would be prevented from being protected by the statute.

The majority opinion is contrary to previous holdings of the Supreme Court of Ohio in which it determined that, where the general contractor does have custody and control, or the right thereto, of the place of employment, the frequenter statutes do have application. *Comerford* v. *Jones and Laughlin Steel Corp.,* 170 Oh.St. 117, 162 N.E. 2d 861 (1959). Other previous relevant holdings are mentiond in the minority opinion which it is submitted is correct and should have been adopted as the opinion of the court to prevent grievous wrong to petitioner. As also shown by the minority, pre-majority Ohio law was that, when common law (here applied by the majority) contravenes a statute, i.e., 4101.11 and 12, the common law *must* yield. See *infra,* p. 7a.

It has been shown in points I and II, *supra,* that this Court will not follow the latest decision of a state court (here the majority interpretation of 4101.11 and 12) where to do so would impair contract rights (here petitioner's right to have a remedy as a "frequenter" under these sections) valid at the time the contract was made according to the state law as then construed (here, according to the minority, under those sections, petitioner was a frequenter).

On the basis of this Court's decision in *Anderson* v. *Township of Santa Ana, supra,* petitioner's contract right to be treated as a frequenter, which accrued to him under a prior construction of Ohio law, was impaired by the *change* of the majority opinion.

In *Havemeyer* v. *The Board of Supervisors of the County of Iowa,* 3 Wall. 294 (1866), the Court held that, where a state court had, before a contract was formed, so interpreted a statute as to give validity to contract rights, its subsequent *change* of interpretation would constitute an impairment of such rights.

In the *Douglass* case, *supra,* this Court stated:

> "The true rule is to give a *change of judicial construction,* in *respect* to a *statute,* the same effect in its operation on contracts and existing contract rights that would be given to a legislative amendment; that is to say, make it prospective, but not retroactive. After a statute has been settled by judicial construction, the construction becomes, so far as *contract rights* acquired under it are concerned, *as much a part of the statute as the text itself,* and a *change of dcision* is, to all intents and purposes, the same in its effect on contracts as an amendment of the law by means of a legislative enactment . . . we cannot give them [the state decisions] a retroactive effect without impairing the obligation of contracts long before entered into. This we feel ourselves prohibited by the Constitution of the United States from doing."

101 U.S. at 687, 25 L.Ed. at 972. (Emphasis supplied.)

If it be contended that the Ohio statutory provisions in 4101.11 and 12 had not been interpreted prior to the case at bar, by analogy to the case of *Great Southern Fire Proof Hotel Co.* v. *Jones, supra,* this Court would be free to determine whether the majority had properly decided, in construing those sections, that petitioner had no contract rights as a frequenter under them. This Court explicitly stated in that case that, if the Supreme Court of Ohio there, had rendered its decision prior to the making of the contract said decision should be followed by the federal courts, and added:

> "But the decision of the state court, as to the constitutionality of the statute in question, *having been rendered after the rights of parties to this suit had been fixed by their contracts,* the circuit Court would have been derelect in duty if it had not exercised its independent judgment touching the validity of the statute here in question." 193 U.S. at 548, 24 S.Ct. at 580. (Emphasis supplied.)

Addressing itself to the question whether the statute was valid as tested by the Ohio constitution, this Court quoted, *ibid.,* from the 1st Section of the Ohio Bill of Rights, providing that "all men . . . have certain inalienable rights, among which are . . . acquiring, possessing, and protecting property," a provision still in effect. The Court then quoted the following excerpt from the opinion of the Ohio case of *Palmer* v. *Tingle,* 55 Oh.St. 423, 45 N.E. 313 (1869):

> "The usual and most frequent means of acquiring property is *by contract, and one of the most valuable and sacred rights is the right to make and enforce contracts.* The obligation cannot be impaired by act of the general assembly." 193 U.S. at 549, 24 S.Ct. at 581. (Emphasis supplied.)

The Court in *Jones* then said:

> "The great weight of authority in this country as to the meaning and scope of constitutional provisions substantially like those to be found in the constitution of Ohio is, in our opinion, against the conclusion reached by the learned state court. Exercising an independent judgment on the subject, we are obliged to so declare." 193 U.S. at 550, 24 S.Ct. at 581.

It may be noted that this case did not involve municipal bonds but a purely private contract.

The *Jones* case clearly holds that this Court will not be bound by a state judicial decision interpreting state law when that decision operates to impair the obligation of contracts formed before the decision was rendered. In such case, this Court will determine independently as to what is the proper interpretation of state law, irrespective of the state judicial interpretation, which this Court will reverse if it is of the opinion that the state decision is improper. As to the freedom of this Court concerning interpretation of contract rights and laws, see also *supra,* p. 68.

The *Folsom* case, *supra,* is also one where no previous judicial decision was involved.

Conclusion

With respect to 4101.11 and 12, the foregoing reasons show:

1. Ohio pre-majority law was that, when common law contravenes a statute, the former must yield.

2. The majority did not follow prior law in relation to this contract, and by *changing* prior law it impaired petitioner's right to be treated as a frequenter under the statute.

3. In impairment cases—as this is—this Court is not bound to, and it is respectfully submitted should not, follow the majority interpretation of 4101.11 and 12.

4. The taking away of a remedy available to a party to a contract—petitioner's remedy as a frequenter—nullifies the contract and, by that impairment thereof, violates the Contract Clause.

V. The Supreme Court of Ohio denied to petitioner the equal protection of laws, guaranteed by Section 1 of Amendment XIV to the Constitution, because:

(a) the court denied to petitioner the equal protection of law enjoyed by other persons in his contractual relationship to respondent, under the general privisions of law, which, according to the court's decision, prevail in Ohio and, more particularly, under the previous long line of decisions of the court itself; and

(b) the court failed to give petitioner the equal protection of law enjoyed by other persons in his contractual relationship to respondent, under the Ohio statute, Sections 4101.11 and 12.

Should this Court find that, as shown in point III, *supra,* the majority unconstitutionally impaired the obligation of contract rights of petitioner by *changing* the court's long line of decisions in force at the time petitioner's contract was formed, it would necessarily, by implication, find that the majority had not extended to him the *equal protection of law* to which all business invitees were entitled to receive under that law.

A state judicial decision which denies the equal protection of the laws is within the inhibition of Amendment XIV. In *Ex parte Virginia, supra,* this Court stated with reference to Amendment XIV, Section 1:

> "A State acts by its legislative, its executive or its judicial authorities. It can act in no other

> way. The constitutional provision therefore must mean that no agency of the State . . . shall deny to any person within its jurisdiction the equal protection of the laws. Whoever, by virtue of public position under a state government . . . denies or takes away the equal protection of the laws, violates the constitutional inhibition." 100 U.S. at 347, 25 L.Ed. at 679.

The same reasoning applies so far as the statement of the majority regarding Sections 4101.11 and 12 is concerned. Should this Court find that, as shown in point IV, *supra,* that the majority unconstitutionally impaired the obligation of the contract rights of petitioner by *changing* prior Ohio law involving Sections 4101.11 and 12, which law was in force at the time petitioner's contract was formed, it would necessarily, by implication, find that the majority had not extended to him the equal protection of law to which all "frequenters" were entitled to receive under the aforesaid sections.

In *Raymond* v. *Chicago Union Traction Co.,* 207 U.S. 20, 28 S.Ct. 7 (1907), it was held that assessment by a state board of equalization of property of certain corporations at a different rate and by a different method from that employed for other corporations of the same class for the same year, which results in disparity and discrimination denies not only the due process of law but also the equal protection of the laws guaranteed by the Fourteenth Amendment against impairment by a state.

In the case at bar, the majority classified petitioner differently from others of the same class having contract rights as business invitees, by not applying the general provisions of the law, which, according to the

majority, prevailed in Ohio prior to the majority opinion. The majority did the same thing with respect to prior statutory provisions concerning contract obligations to a frequenter. By analogy to *Raymond,* this action of the majority would constitute a violation of both the due process of law and the equal protection of the laws.

In *Barbier* v. *Connolly,* 113 U.S. 27, 31, 5 S.Ct. 357, 359 (1884), this Court stated:

> "The fourteenth amendment, in declaring that no state 'shall deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws,' undoubtedly intended not only that there should be no arbitrary deprivation of life or liberty, or arbitrary spoliation of property, but that *equal protection* and security should be given to all *under like circumstances* in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness, and acquire and enjoy property; that they should have *like access to the courts of the country* for the protection of their persons and property, the prevention and *redress of wrongs, and the enforcement of contracts;* that no impediment should be interposed to the pursuits of any one, except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition; and that in the administration of criminal justice no different or higher punishment should be imposed upon one than such as is prescribed to all for like offenses." (Emphasis supplied.)

Having in mind the statement just quoted, point III, *supra,* shows that, prior to the majority opinion, petitioner would have been treated, under his contract, as

a business invitee like other businessmen "under like circumstances" and, as such, he would have had "redress of wrongs" resulting from respondent's negligence. It is clear from the statement just quoted that not having received, as a result of the *change* of law by the majority opinion, the "redress" which was due him, he was thereby deprived of the constitutional right of equal protection of the laws guaranteed by the Fourteenth Amendment. We have seen that a denial of a contract remedy amounts to impairment of the contract. See *supra*, p. 90.

The due process clause of the Constitution includes within its scope the guarantee of the equal protection of laws. In *Smyth, et al.* v. *Ames, et al.*, 169 U.S. 466, 526, 18 S.Ct. 418, 426 (1898), the Court stated:

> "A state enactment, or regulations made under the authority of a state enactment, establishing rates for the transportation of persons or property by railroad that will not admit of the carrier earning such compensation as, under all the circumstances, is just to it and to the public, would deprive such carrier of its property without due process of law, *and deny to it the equal protection of the laws,* and would, therefore, be repugnant to the fourteenth amendment of the constitution of the United States." (Emphasis supplied.)

VI. The Supreme Court of Ohio denied to petitioner the due process guaranteed by Section 1 of Amendment XIV to the Constitution because (a) the denial by the court to petitioner of the equal protection of laws amounts to a denial of due process; and (b) the non-application by the court, to this case, of the general provisions of the law of contract obligations prevailing in Ohio amounts to a taking by the state, through its judiciary, of the property of petitioner without due process of law.

In point V it was shown that the majority denied to petitioner the equal protection of laws guaranteed by Section 1 of Amendment XIV.

The right to contract is a constitutionally protected property right, as is an interest in a contract and a right of action on contract. 10 Oh.Jur. 2d 559, Section 492 with authorities.

In a long line of cases, this Court has held that contracts constitute property rights. In *Hepburn* v. *Griswold,* 75 U.S. 603, 624, 19 L.Ed. 513 (1870), this Court stated: "A very large proportion of the property of civilized men exists in the form of contracts."

In *Long Island Water Supply Co.* v. *Brooklyn,* 166 U.S. 685, 690, 17 S.Ct. 718, 720 (1897), it was stated: "Second. *A contract is property,* and, like any other property may be taken under condemnation proceedings for business use." (Emphasis supplied.) Even as between different countries, international law also holds that a *contract is property.*

In the *Rudloff* case, American-Venezuelan Commission of 1903, (*Ralston's Report,* p. 182), Commissioner Bainbridge stated:

> "The taking away or *destruction of rights acquired,* transmitted, and defined *by a contract is*

as much a wrong, entitling the sufferer to redress, as the taking away or destruction of tangible property; and such an act committed by a government against an alien resident gives, by established rules of international law, the government to which the alien owes allegiance and which in return owes him protection, the right to demand and to receive just compensation. Such an act constitutes the basis of a 'claim' clearly within the meaning and intent of the convention constituting this Commission (pp. 188-189)." (Emphasis supplied.)

The right to follow any of the ordinary callings of life is one of the privileges of a citizen of the United States. 16 Am.Jur. 2d 836, Sec. 480 with authorities. The right to enter into a contract is a liberty and a right falling within the protection of the due process clause of the Fourteenth Amendment. It is clear, therefore, that an unwarranted and unconstitutional judicial interference with the reasonable pursuit of a legitimate business or calling, and interference with contractual relationships incident thereto, constitute an unlawful deprivation of the rights under the said Amendment when carried on through the state judicial process. See 16 *ibid.* 2d 704, *et seq.*, Sec. 373.

In the case at bar, petitioner, as part of a business as an excavating contractor, entered into a valid contract with respondent, *authorizing petitioner under color of right, without limitation as to time and place, to do the work contracted for in the agreement.* As a corollary to the freedom of petitioner to engage in his business pursuant to his contract with respondent is his right to be upon the premises without sacrifice of the judicial sanctions of both the common law and statute for his protection from the negligence of the respondent, the general contractor. The effect of the

majority opinion in this case is to deprive the petitioner of all of the foregoing guarantees basic to the Constitution of the United States and of Ohio relative to a legitimate entry upon property, pursuant to contract, in pursuit of a lawful business enterprise, by judicially imposing a condition not written into the contract requiring petitioner to conduct his business only at certain prescribed times.

Independent contractors can no longer be regarded as "independent" under the judicial limitations which the majority opinion in this case imposes for their physical safety.

All organs of the estate, whether legislative, executive or judicial are constitutionally prohibited from denying to any person due process of law. *Ex parte Virginia, supra.*

It follows that a state court may not interpret a state law in such a way as to deprive a person of property without due process of law. Pragmatically, as well as juridically, a contract right constitutes property only when the breach of the obligation created by the contract gives rise to actionability. If the breach was not clothed with enforceability, the contract right would be an empty shell. We have seen that denial of a remedy constitutes impairment, *supra*, p. 88 et seq.

Since a state law existing at a time when a contract is made impliedly forms part of the contract, it is obvious that a subsequent unconstitutional *change* of law deprives the person having the contract right of due process of law. The question of the unconstitutionality of the decision of the majority was shown in points III and IV, *supra*. Had the majority not

changed the law unconstitutionally, petitioner, as was his right under the contract between him and the respondent, would have been considered a business invitee under common law or a frequenter under Section 4101.11 and 12, and as such, would have been entitled to the amount of damages awarded to him for breach of respondent's contractual obligation to petitioner as a business invitee. Had petitioner received the amount awarded to him by the jury for the breach by respondent of his contractual obligation to the petitioner as invitee, i.e., the obligation of due care, it would be specious to contend that such a sum of money would not have been property in the hands of the petitioner. The only cause that deprived him of *that property* was the *unconstitutional change* by the majority of the Ohio law in existence at the time when petitioner's contract was formed.

Both the *Muhlker* and the *Sauer* cases, *supra*, involved property rights stated in terms of contract. It is submitted that this Court would have been justified in exercising jurisdiction in those two cases under the due process of law provision of the Fourteenth Amendment. Had it done so, it could have held that the property involved in those cases had been taken in violation of this provision when contract rights acquired on the faith of a judicial decision were impaired by a subsequent unconstitutional *change* of decision by a state court.

The *Story* case, *supra*, also shows that unconstitutional impairment of contract rights amounts to taking of property without due process of law.

VII. The Supreme Court of Ohio, by invading the functions of the jury, denied to petitioner his rights under Amendment VII to the Constitution, as well as under the common law, to have a fact tried by a jury, where the question of fact, whether the petitioner's visit to the construction site was for a purpose incident to the performance of the contract between petitioner and respondent and for the benefit of respondent, had been submitted as a fact to the jury in view of the existence of probative evidence and where the Supreme Court of Ohio undertook to reweigh the evidence concerning this issue of fact and made a finding contrary to that of the jury on this issue.

The question of fact whether petitioner made the Sunday visit to the construction site for a purpose incident to the performance of the contract between him and respondent and for the benefit of respondent was submitted to the jury. This question was tried by the jury and was answered in the affirmative. As shown by the record evidence in the Statement of Facts, *supra,* and in point III, *supra,* there was probative evidence to go to the jury. It is not necessary to support this point by a contention on the part of petitioner that the evidence on this issue was sufficient to justify the trial judge to find, as a matter of law, in favor of petitioner on this point. Petitioner, however, does believe that the evidence on this point was so overwhelming in his favor that it would have justified such a finding by the trial judge and that the respondent got the better of it in this case by having this issue submitted to the jury as a question of fact. The trial court approved the verdict and consequently the finding of the jury on this issue.

The Court of Appeals found, "After a careful consideration of all the evidence in the light of the applicable principles of law" that "There is a sufficiency of

evidence to establish that plaintiff's [petitioner's] *purpose in being upon the premises* [on his Sunday trip] *was ultimately connected with the proper performance of the subcontract between plaintiff and defendant* [respondent]" and also that *"The evidence establishes a direct pecuniary benefit to defendant by such compliance on the part of the plaintiff,"* 197 N.E. 2d at 403, and *infra,* p. 20a. (Emphasis supplied).

The *majority* arrived at the conclusion that petitioner's Sunday visit was not for the benefit of the respondent by *weighing evidence concerning a disputed question of fact which the jury had decided in favor of petitioner and in regard to which there was probative evidence.* The majority compounded this prejudical and reversible error and the concomitant unconstitutional infringement thereby of petitioner's right of trial by jury by laborious contentions which ignore the substantial body of record evidence mentioned in the Statement of Facts, *supra,* and in point III, *supra,* evidence which entitled the jury to find a definite business advantage to respondent by the presence of petitioner on Sunday at the time and place of his injury. And again, on the point of benefit to respondent, the majority further compounded its unconstitutional invasion of the functions of the jury by, as the minority called them, *"factual contentions"* which are *"disputed by the record"* (Emphasis supplied). This most germane statement was immediately preceded by the following cogent and persuasive observation: "It appears that the opinion of the majority is somewhat in the nature of an argument upon the facts. This court does not ordinarily weigh the evidenc." 3 Oh. St. at 175 and *infra,* p. 8a.

In view of the plethora of evidence of fact mentioned in the Statement of Facts, *supra* and in point III,

supra, and of the findings of the jury that petitioner's visit to the construction site was for a purpose incident to the performance of the contract between him and the respondent, it is respectfully submitted that this Court should hold that the Ohio Supreme Court exceeded permissible limits of appellate functions and invaded the province of the jury by its re-examining the facts submitted to the jury and disagreeing with the jury's factual findings on this issue in favor of petitioner. The Court of Appeals stated "there is ample evidence to support each question of fact tried by the jury in the instant case. 197 N.E. 2d at 409 and *infra,* p. 33a.

In *Slocum* v. *New York Life Insurance Co.,* 228 U.S. 364, 33 S. Ct. 523 (1913), this Court held that the U.S. Circuit Court of Appeals, Third Circuit, had no authority, after a verdict, to *determine the facts submitted to the jury* and enter a judgment *non obstante verdicto.* The Court stated:

> "But, instead of ordering a new trial, as was required at common law, *the circuit court of appeals itself re-examined the issues, resolved them* in favor of the defendant, and directed judgment accordingly. This, we hold, could not be done consistently with the 7th Amendment, which not only *preserves the common-law right of trial by jury, but expressly forbids that issues of fact settled by such a trial shall re-examined otherwise than 'according to the rules of the common law'.*" 228 U.S. at 399, 33 S. Ct. at 537 (Emphasis supplied.)

Attention may also be called to that part of the statement just quoted that Amendment VII "preserves the common-law right of trial by jury." And there is no need to cite authorities in support of the proposi-

tion that, at common law, questions of fact are for the jury.

The rule in *Slocum,* was followed by this Court in *Martha S. Young* v. *Central Railroad Co. of N.J.,* 232 U.S. 602, 34 S.Ct. 451 (1914).

At common law the only means to re-examine questions of fact tried by jury are by granting a new tiral or a *venire facias de novo. Parsons* v. *Bedford,* 3 Pet. 433, 447 (1830).

In *Dennis* v. *The Denver & Rio Grande Western Railroad Co.,* 375 U.S. 208, 84 S. Ct. 291 (1963), a lower state court in Utah rendered judgment for the plaintiff in a suit under the Federal Employees' Liability Act, 45 U.S.C.A. §51 *et seq.,* hereinafter referred to as the F.E.L.A. On appeal by the defendant, the Supreme Court of Utah vacated the jury verdict and ordered the entry of judgment for the defendant. On certiorari, this Court held that, where plaintiff's evidence, though vigorously disputed, was sufficient to support the jury's conclusion that defendant's negligence contributed to the injury, *the appellate court's function was exhausted, and it could not properly substitute its judgment for that of the jury* and decide that it was the plaintiff's own conduct that resulted in his injury.

The Court said:

> "But in FELA cases this Court has repeatedly held that where 'there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever the facts are inconsistent with its conclusion.' Lavender v. Kurn, supra, 327 U.S., at 653, 66 S. Ct. at 744, 90 L. Ed. 916. 'Only *when there is a complete absence of probative facts* to support the conclusion reached [by the jury] does

a reversible error appear.' Ibid." 375 U.S. at 210, 84 S. Ct. at 293 (Emphasis supplied).

With respect to the underscored part in the statement just quoted, can anyone examining the record evidence in the Statement of Facts, *supra,* and in point III, *supra,* seriously contend that in the case at bar "there is a complete absence of probative facts to support the conclusion reached [by the jury]" that petitioner's Sunday visit was for the benefit of respondent and for a purpose incident to the performance of the contract between petitioner and respondent?

In *Dennis, supra,* the Court held:

> "In this case, petitioner's evidence, though *vigorously disputed,* was sufficient to support the jury's conclusion that respondent's negligence contributed to the injury. Hence, *'the appellate court's function* [*was*] *exhausted,* Lavender v. Kurn, supra, 327 U.S., at 653, 66 S. Ct. at 744, 90 L. Ed. 916, and it could not properly substitute its judgment for that of the jury and decide, as the Supreme Court of Utah did here, that 'it seems quite inescapable that it was [petitioner's] own conduct * * * that resulted in this regrettable injury.' 13 Utah 2d, at 255, 372 P. 2d. at 7." 375 U.S. at 210, 84 S. Ct. at 293. (Emphasis supplied).

The case referred to in the statement just quoted, *Lavender* v. *Kurn,* 327 U.S. 645, 66 S. Ct. 740 (1946), was an action under the F.E.L.A., *supra.* This Court held that in a suit for the death of a railroad switch tender, where there was basis in evidence for inferring that a mail hook switch from the side of a mail car struck the deceased and the jury made that inference, *the factual dispute on this point could not be relitigated*

in the reviewing court and the fact that there was evidence tending to show that it was *physically and mathematically impossible* for the hook to strike the deceased and showing facts from which it might reasonably be inferred that the deceased was *murdered* was *irrelevant* on appeal.

In connection with the F.E.L.A., a question arises whether an employee was, at the time receiving an injury sued for, engaging in interstate commerce. Where the facts are in dispute or more than one inference can be drawn from them the question is for the jury. Twenty-two cases in support of this rule are cited in Note 1248 of 45 U.S.C.A. §51, including the 1965 Annual Pocket Part. If the complexity of the issues whether one is engaged in interstate commerce in the myriads of situations that might be involved therein can be left to the jury, *a fortiori* the comparatively simpler question of fact whether petitioner's Sunday visit was for the benefit of the respondent and for a purpose incident to the performance of the contract between petitioner and respondent was properly left to the jury's decision in view of the existence of probative evidence on this point.

No case has been found in which this Court has held that the aforesaid F.E.L.A. rule regarding the determination of a question of fact by the jury is not applicable to other cases than those arising under the Act or has made a distinction between negligence under that Act and negligence in other cases so far as the right of trial by jury is concerned. As a matter of fact, as stated in *Slocum, supra,* p. 119, Amendment VII "preserves the common-law right of trial by jury.

That the interpretation of F.E.L.A., so far as the role of the jury is concerned, is not restricted to that Act,

but may be applied in other cases is also known by *Continental Ore Co., et al.* v. *Union Carbide & Carbon Corporation, et al.*, 370 U.S. 690, 82 S. Ct. 1404 (1962). This was a private treble damage action under anti-trust laws in which a judgment for the defendant was affirmed by the U.S. Court of Appeals, Ninth Circuit. In reversing the judgment of the lower court, this Court held that the lower court was wrong in taking the case away from the jury and not leaving it to the jury to decide whether the plaintiff partnership, engaged in the production and distribution of vanadium, was damaged by alleged monopolistic elimination of its independent suppliers by defendants, who were engaged in mining vanadium ore, processing vanadium and selling its products, whether the defendants refused to deal with the partnership and whether the partnership failed to take advantage of independent sources of supplies. On the basis of the F.E.L.A. rule concerning the role of the jury, this Court stated:

> "Undoubtedly, *all of the evidence* during this period *does not point in one direction* and *different inferences might reasonably be drawn from it.* There was, however, sufficient evidence to go to the jury and it is the jury which 'weighs the contradictory evidence and inferences' and draws 'the ultimate conclusion as to the facts.' Tennant v. Peoria & P.U.R. Co., 321 U.S. 29, 35, 64 S. Ct. 409, 412, 88 L. Ed. 520." 370 U.S. at 700, 82 S. Ct. at 1411. (Emphasis supplied).

The *Tennant* case, just cited, is an F.E.L.A. case and shows that the interpretation of that Act, so far as the role of the jury is concerned, is not restricted to that Act but may be applied in other cases. In *Tennant*, this Court held that, where an inference drawn by the jury that the railroad's negligence was the cause of the

fatal accident to an employee had support in the evidence, an order for judgment for the railroad notwithstanding the verdict would be improper *as depriving the plaintiff of the right to a jury trial.*

The Court stated:

> "Courts are not free to reweigh the evidence and set aside the jury verdict merely because *the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable.*
>
> "[9] Upon an examination of the record we cannot say that the inference drawn by this jury that respondent's negligence caused the fatal accident is without support in the evidence. Thus *to enter a judgment* for respondent *notwithstanding the verdict* is to *deprive petitioner of the right to a jury trial.* No reason is apparent why we should *abdicate* our *duty to protect and guard that right in this case.*" 321 U.S. at 35, 64 S. Ct. at 412 (Emphasis supplied).

It is respectfully submitted that this Court should reverse the judgment of the Supreme Court of Ohio, if for no other reason because that court, in the language of the statement just quoted, was "not free to reweigh the evidence and set aside the jury verdict" and thereby "to deprive petitioner of the right to a jury trial." On the issue whether petitioner's Sunday visit was for the benefit of respondent and for a purpose incident to the performance of the contract between him and petitioner, this rule as to the role of the jury is especially applicable in this case in view of the fact that the jury had already found for the petitioner on that issue and of the further fact that there was probative evidence on that issue.

VIII. The Chief Justice of the Supreme Court of Ohio should have disqualified himself from taking part in the decision of this case.

Petitioner is informed and believes and therefore asserts that one of the four judges that joined in the majority opinion of the Supreme Court of Ohio, Chief Justice Kingsley A. Taft, was at one time associated with the law firm that successfully represented the respondent before that court, Arter, Hadden, Wykoff & Van Duzer. The petitioner is not informed and does not therefore assert of the exact name of the said firm at the time of the Chief Justice's association with it.

Because of this association petitioner believes that the Chief Justice should have disqualified himself from taking part in the decision of this case.

Petitioner is also informed and believes and therefore asserts that the usual practice prevailing in the Supreme Court of Ohio, in case of disqualification of one of its members, is to have a judge from another court substitute for the disqualified judge in the consideration and decision of a case.

Should the Chief Justice have disqualified himself, the substitute judge might or might not have agreed with the other three judges that joined in the majority opinion. In the latter case, the minority opinion would have become the majority one. Not only constitutional and other legal issues but also considerations of fairness, justice, and to the petitioner, a most important factor, deprivation of damages for serious injuries due to respondent's negligence, would require this Court not to conclude that the substitute judge would have had the same opinion as the Chief Justice and that

consequently the majority opinion would have been, in that event, the same as the one rendered by the present majority.

Of course, substitution assumes availability of another judge to substitute for this Chief Justice. Is this an assumption that, in the light of the factors just mentioned, this Court would decide against the petitioner and affirm the judgment of the Supreme Court of Ohio? And, had no such substitute been available, there would definitely have been in this case a three to three split of votes, in which event, in accordance with usual practice, the judgment of the Court of Appeals for petitioner would have been affirmed.

CONCLUSION

For all the reasons and considerations set out above, the judgment of the Supreme Court of Ohio is repugnant to the aforesaid provisions of the Constitution of the United States and should be reversed.

This petition for a writ of certiorari should, therefore, be granted.

Respectfully submitted,

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APPENDIX A

THE SUPREME COURT OF OHIO

Case No. 38934

PETER L. SALEMI, *Plaintiff-Appellee*

v.

DUFFY CONSTRUCTION CORPORATION, *Defendant-Appellant*

Opinion

SALEMI, APPELLEE

v.

DUFFY CONSTRUCTION CORP., APPELLANT

[Cite as Salemi v. Duffy Construction Corp., 3 Ohio St. 2d 169]

Negligence—Subcontractor holding grading and excavating contract—Entering construction site Sunday evening when no work being done—A licensee—General contractor's duty to licensee.

1. Where one who holds a grading and excavating subcontract for a rough construction site enters upon such site on a Sunday evening at dusk, for his own benefit and when no work is in progress or has been done on that Sunday, and when his contract does not require his presence at the site on Sunday, and when neither the owner nor general contractor has made an express or implied request for his presence on the site at that time or knows of his presence or intention to enter upon the site at such time, such subcontractor is a licensee.

2. A general contractor in control of such premises owes a licensee the duty not to injure him by willful or wanton misconduct or any affirmative act of negligence and, if he knows of his presence, to warn him of any danger.

(No. 38934—Decided July 28, 1965.)

APPEAL from the Court of Appeals for Cuyahoga County.

The plaintiff, a subcontractor, instituted this negligence action for personal injuries alleged to have been sustained when he fell into an open excavation on a construction site, and named as defendant the general contractor.

The plaintiff, whose subcontract required him to do the excavating and grading, visited the construction site on Saturday, October 6, 1956, at about 1:30 p. m., for the purpose of laying out his plan of work for the following week.

After the plaintiff left the premises, the defendant's foreman directed an employee of another subcontractor to make an excavation 40 feet long for the purpose of installing toilet facilities and a septic tank on the construction site as required by the defendant's contract with the owner, the General Electric Corporation. For the most part, this was a shallow excavation, but that part of the excavation which was most distant from the public highway was 6 feet wide and 7 feet deep for a length of about 10 feet. The entire excavation at all points was more than 200 feet from the public highway.

The plaintiff testified that on Sunday, October 7, he returned to the construction site at approximately 6:00 p. m. The sun had set and it was dusk. He stated that his purpose in returning to the site was to examine the condition of the premises to see whether the rain which had fallen during Saturday night and part of the day Sunday necessitated changes in his work plan for the next day. He also wanted to check his equipment.

The plaintiff parked his car, turned out his car lights and walked along the tracks of an old farm road which once had led from the public highway to a barn and farmhouse before the premises had been acquired as a construction site. This former farm road was being used by workmen as an entrance way to the construction site.

The excavation which had been made the previous day ran parallel and adjacent to this roadway.

The plaintiff walked along the roadway beside the shallow part of the excavation for some 30 feet. He testified that he could see clods of dirt and ruts in the roadway, and that he noticed a windrow of dirt which was along the far side of the excavation, but that he did not descern the hole created by the excavation. There were no warning lights or barricades.

The plaintiff fell into the deep part of the excavation and was injured.

After jury trial, a verdict was returned fer the plaintiff in the amount of $185,000. A motion for a new trial was denied.

The Court of Appeals, with one member dissenting, affirmed the judgment of the trial court.

The cause is before this court upon the allowance of a motion to certify the record.

Messrs. Dudnik, Komito, Nurenberg, Plevin, Dempsey & Jacobson and *Mr. Marshall I. Nurenberg,* for appellee.

Messrs. Arter, Hadden, Wykoff & Van Duzer and *Mr. Smith Warder,* for appellant.

O'Neill, J. The question presented to this court is whether the plaintiff was a business invitee or merely a licensee at the time when he fell into the excavation and was injured.

It is agreed that the plaintiff was not required by his contract to visit the construction site on a Sunday evening when no work was in progress and no other person was present on the premises. It is agreed that no work was done on Sunday. It is agreed that there was no express or implied request by the defendant that plaintiff visit the construction site on Sunday evening at dusk. There is

nothing in the record which would indicate that the defendant had any reason to know that the plaintiff would visit the construction site at dusk on that Sunday evening.

The plaintiff makes no contention that the defendant was liable under Sections 4101.11 and 4101.12 of the Revised Code (frequenter statutes). Plaintiff makes no claim that he was a frequenter.

Sections 4101.11 and 4101.12, *supra,* are not applicable in this case. The premises were obviously not a place of employment on Sunday evening. No work was being performed.

The plaintiff relies solely upon the claim that he was a business invitee of the defendant.

The plaintiff maintains that his visit was for the benefit of the defendant, on the ground that the defendant was urging him to complete his subcontract as quickly as possible, and on the further ground that, if the defendant's contract with the owner, the General Electric Corporation, was completed at a cost below the guaranteed maximum, the defendant was to receive 25% of the savings below that guaranteed maximum, and the General Electric Corporation was to receive 75% of such savings.

The weakness in plaintiff's position is that the plaintiff's subcontract with the defendant called for a unit-price contract under which the amount to be paid to plaintiff by the defendant was computed upon the amount of earth moved, rather than on the time spent.

In addition to that, the time limit in the defendant's contract with the General Electric Corporation did not begin to run until the structural steel was erected.

It appears that the plaintiff went to the construction site at dusk on Sunday evening for his own benefit. This is substantiated by his testimony that, if the rain had been

heavy enough to prevent efficient work the following day, he could call the person from whom he rented the equipment and request that no men be sent to the job the next morning, thus saving himself the cost of renting the equipment for that day and the cost of wages of the men.

He testified further that he could divert some of his own equipment to other areas where he had jobs, thus making an additional saving for himself.

The record does not support the plaintiff's position that his trip to the construction site on Sunday evening was for the benefit of the defendant, or that it was required by his contract with the defendant, or that it was requested by the defendant, or that the defendant had knowledge that he intended to make such a trip. The plaintiff was not a business invitee to this construction site at that time, but a licensee. *Scheurer* v. *Trustees of The Open Bible Church,* 175 Ohio St. 163; *Scheibel* v. *Lipton,* 156 Ohio St. 308; *Keesecker* v. *G. M. McKelvey Co.,* 141 Ohio St. 162, 166.

The defendant owed to this plaintiff-licensee the duty not to injure him by willful or wanton misconduct or any affirmative act of negligence. *Scheurer* v. *Trustees of The Open Bible Church, supra; Soles, Admr.,* v. *Ohio Edison Co.,* 144 Ohio St. 373; *Hicks* v. *Village of Cortland,* 123 Ohio St. 114, 117; *Cleveland, Cincinnati, Chicago & St. Louis Ry. Co.* v. *Potter,* 113 Ohio St. 501; *Hannan, Admr.,* v. *Ehrlich,* 102 Ohio St. 176; *John* v. *Reick-McJunkin Dairy Co.,* 281 Pa. 543, 127 A. 143; 65 Corpus Juris Secundum 491 to 504, Sections 35 to 38.

Plaintiff does not claim that there was a hidden trap or any violation of a duty concerning the condition of the premises prescribed by statute, ordinance or safety regulations for the benefit of the plaintiff.

The defendant did not know of the plaintiff's presence on the premises and had no opportunity to warn him of any

danger. *Scheurer* v. *Trustees of The Open Bible Church, supra*, paragraph two of the syllabus.

The determination of this question requires a reversal of the judgment of the Court of Appeals, and it is unnecessary to consider any other alleged errors.

The judgment of the Court of Appeals is, therefore, reversed and final judgment is rendered for the defendant.

Judgment reversed.

TAFT, C. J., ZIMMERMAN and SCHNEIDER, JJ., concur.

MATTHIAS, HERBERT and BROWN, JJ., dissent.

HERBERT, J., dissenting. The question here, as stated in the majority opinion, is whether appellee was a "licensee" or an "invitee" at the time when he was injured. The answer to this question as well as the determination of the duty owed by appellant, the construction company, to the appellee, according to the majority opinion, requires the application of principles of the common law. However, the General Assembly enacted Sections 4101.11 and 4101.12 of the Revised Code and thereby, in plain and definite language, abrogated the common law and defined the duty owed by appellant to appellee by statutory enactment.

These sections of the Revised Code read in part:

Section 4101.11. "Every employer shall furnish employment which is safe for the employees engaged therein, shall furnish a place of employment which shall be safe for the employees therein *and for frequenters thereof,* shall furnish and use safety devices and safeguards * * * and shall do every other thing reasonably necessary to protect the life, health, safety, and welfare of such employees *and frequenters.*" (Emphasis added.)

Section 4101.12. "No employer shall require, permit, or suffer any employee to go or be in any employment or place

of employment which is not safe, and no such employer shall fail to furnish, provide, and use safety devices and safeguards, * * * or to adopt and use methods and processes reasonably adequate to render such employment and place of employment safe. No employer shall fail to do every other thing reasonably necessary to protect the life, health, safety, and welfare of such employees *or frequenters.* No such employer *or other person* shall construct, occupy, or maintain any place of employment that is not safe." (Emphasis added.)

No reference, directly or indirectly, is made in these statutes to invitees or licensees. Such terms are not material in the application of the statutes. When the common law contravenes a statute, the common law must yield. This is axiomatic.

9 Ohio Jurisprudence 2d 558, Section 7, reads in part as follows:

"Ohio courts have naturally *always* upheld the precedence of the statutes enacted by the Legislature when the question at issue concerned *some principle of the common law* seemingly in contravention of the legal provisions, but sought to be enforced by one of the parties." (Emphasis added.)

The principle just quoted applies quite precisely to the case at bar. There a party sought to support his position by reference to the common law; here the appellant is endeavoring to do the same thing. There the principles of the common law were in contravention of the statute; here is precisely the same situation. There the courts ruled that the common law was not applicable and that the statutes must prevail; here the same result should have been reached by the majority.

The term, "frequenter," as used in the quoted statutes, *supra,* includes a subcontractor. In substance, a "fre-

quenter" means one who frequents, one who often or habitually visits or resorts to a place. Consequently, the appellee here, as a subcontractor, is a "frequenter" within the provisions of safe-place statutes requiring employers to furnish a safe place of employment. *Frankovis* v. *Klug & Smith Co.*, 275 Wis. 156, 81 N.W. 2d 495; *Williams* v. *International Oil Co.*, 267 Wis. 227, 64 N.W. 2d 817.

It follows, therefore, that the majority opinion, being based upon common-law principles which have been abrogated by statute, is not supported by sound legal principles.

The jury found that appellant was negligent and that such negligence was the proximate cause of appellees injuries and returned a verdict for $185,000. The trial court approved the verdict and entered judgment upon it. The Court of Appeals, in the performance of its constitutional duty to weigh the evidence (Section 6 of Article IV of the Constitution of the state of Ohio) affirmed the judgment of the lower court.

It seems apparent that the negligence of the appellant was generated from its failure to adopt the safety precautions required by Sections 4101.11 and 4101.12 of the Revised Code, *supra.*

It appears that the opinion of the majority is somewhat in the nature of an argument upon the facts. This court does not ordinarily weigh the evidence. But, it is my opinion that the factual contentions of the majority opinion are in certain instances disputed by the record. This is true in the area of evidence that it was the duty of appellee to hasten his job to completion so that other phases of the project could be completed, or well along, before bad weather set in. This was for the acknowleged benefit of the appellant.

The testimony of Mr. Duffey, president of appellant construction company, discloses the following:

"Q. Was there any particular reason why one particular sheet was devoted strictly to Central Excavating Company [Salemi's concern], keeping these kinds of records? A. I——

"Q. It seems to show—it shows their equipment. A. Well, we were interested in the amount of equipment that Central Excavating had on the job, *due to the fact that winter was not far away and we wanted to have the work progress so that we could get our foundation in and our steel erected before the very bad weather set in.*

"Q. In fact, time was somewhat of the essence? A. Yes, it was.

"Q. Wasn't it, in this phase of the work? A. Yes.

"Q. Rather important to get all the excavating work out of the way so that these other people could come in and do their work before your winter set in? A. *That's right.*" (Emphasis added.)

Mr. Salemi, appellee, who was the Central Excavating Company, had a vast amount of planning to do in order to keep a large amount of equipment, both heavy and light, busy on a large job such as this. In an effort to complete the excavating as soon as possible he worked his men six days a week plus overtime.

The testimony of Mr. Salemi, appellee, discloses the following:

"Q. Was time a factor in that contract, Mr. Salemi? A. Yes, it was, because we were very much told that one of the reasons they [appellant] gave us the contract was that they expected us to in plain words hit it hard, and that means to get the job done in a hurry because they had quite a big job to do and *they couldn't do anything unless the excavation was done first,* and November was just around the corner, and so was December, and so *we*

promised them [appellant] we would really go at it hard and try to get the job done.

"Q. How many days a week were your men working? A. On this job, which isn't very common, we worked six days a week and we worked overtime every day.

"Q. You say that was or was not common? A. It was not common. We don't—in other words, I mean we don't work—usually work overtime and on Saturdays unless *there is a definite hurry or some agreement to do it.*" (Emphasis added.)

In the case at bar there was both urgency required by the approach of bad weather and a definite agreement between the parties that Salemi, appellee, would drive the work as hard as he could and plan accordingly.

This and other evidence indicates quite clearly that even under the common law appellee was an invitee of the appellant. At least there was ample evidence for the jury to reach such a conclusion.

For the foregoing reasons, and others that could well be discussed, the judgment of the Court of Appeals should have been affirmed.

THE SUPREME COURT OF OHIO

Case No. 38934

PETER L. SALEMI, *Plaintiff-Appellee*

v.

DUFFY CONSTRUCTION CORPORATION, *Defendant-Appellant*

Certificate

I, THOMAS L. STARTZMAN, Clerk of the Supreme Court of the State of Ohio, do hereby certify that the foregoing is a true and correct copy of the opinion rendered by this Court in the above entitled case and as reported in 3 Ohio St. 2d, 169.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the Seal of said Supreme Court this 4th day of January 1966.

SEAL

THOMAS L. STARTZMAN
Clerk, The Supreme Court of Ohio
NORMAN MYERS
Chief Deputy Clerk

APPENDIX B

IN THE COURT OF APPEALS OF OHIO
CUYAHOGA COUNTY, EIGHTH DISTRICT

No. 26,635

PETER L. SALEMI, *Plaintiff-Appellee*

v.

DUFFY CONSTRUCTION CORPORATION, *Defendant-Appellant*

Majority Opinion

March 26, 1964

• • • • • • • • • • •

WASSERMAN, J.

This case is before this court on an appeal on questions of law from a jury verdict of $185,000.00 and judgment entered thereon in the Court of Common Pleas of Cuyahoga County against defendant, Duffy Construction Corporation, in favor of the plaintiff, Peter L. Salemi. For the purpose of brevity, Peter L. Salemi, plaintiff appellee, will hereafter be referred to as plaintiff and Duffy Construction Corporation, defendant appellant, will be referred to as defendant.

Plaintiff was an individual engaged in the business of grading and excavating contract work under the name of the Central Excavating Company. Defendant had entered into a general contract with the General Electric Corporation for the construction of a plant on premises bordering on Highland Road in the Village of Richmond Heights in Cuyahoga County. Plaintiff obtained a subcontract from the defendant to perform the excavating and grading work on the project. The property in question was located to the south of Highland Road. These premises contained a driveway leading form Highland Road. The driveway was ap-

proximately 12 to 15 feet wide and approximately 400 feet long. The terrain on each side of the driveway was level for an estimated 20 feet. Throughout the proceedings in the trial court this driveway was referred to as "the existing driveway" and was used by all persons engaged in the work on the construction project.

The plan for construction called for a new driveway to the east of the existing one and parallel to the one in use. It was intended to replace the existing driveway when the new driveway had reached a point in construction where the sub-base was laid down. The existing driveway would then be excavated for the purpose of placing a storm sewer within the excavation and would then be recovered.

The testimony indicates that on October 7, 1956, at 6:00 P.M., the sub-base had not been laid down on the new driveway and the existing driveway was still in full use.

At the time of the accident, there were three contractors concerned with the undertaking. These were the defendants as the general contractor, the plaintiff as the grading and excavating contractor, and the Norton Construction Company as the sewer sub-contractor.

Prior to the time of the accident, the Norton Construction Company was occupied with a trench excavation near Highland Road approximately 450 feet west of the existing driveway. On this job it was using a device called a backhoe. The plaintiff had placed grading and excavating equipment on the premises.

The defendant was to erect a field office and was to provide temporary toilet facilities under its General Electric contract. The location of these facilities was not shown on any plans with which the plaintiff was familiar. The location of the field office, and the septic tank to be used by the toilet facilities, was left to the discretion of the

defendant subject only to the approval of the General Electric Company.

The contract between the defendant and the General Electric Company was a guaranteed maximum contract with a completion clause. The completion clause provided: "Time is of the essence of the contract." It further provided that if the costs of the work, plus fixed fees, be less than the guaranteed maximum, the difference representing the saving was to be apportioned to a specific percentage between the defendant and the General Electric Company.

Plaintiff, through his subcontract, had a unit price agreement under which he was to be paid in accordance with the amount of earth moved rather than on a time basis. There was a schedule prepared by the defendant in the plaintiff's contract which contained a "time is of the essence clause."

There was testimony that the plaintiff was under pressure from the defendant. He, therefore, kept his crew working six days a week with overtime every day of the week. Francis F. Duffy, President of the defendant corporation, testified that his construction supervisor kept a separate sheet of plaintiff's progress and the amount of equipment plaintiff had on the job "due to the fact that winter was not far away and we wanted to have the work progress so that we could get our foundation in and our steel erected before the very bad weather set."

The evidence shows that the plaintiff would personally visit the scene of his various projects to check with his works' foreman, that on Saturday, October 6, 1956, plaintiff visited the scene of this project, arriving at approximately 1:30 P.M., and that his purpose in going to the premises was to make the necessary field changes on the job and to discuss these with his on-the-job foreman and to discover if the defendant construction superintendent

wanted anything particularly done. It also shows that at the time of the plaintiff's visitation, the weather was dry as it had been during the course of the work on this project and that he noticed that the backhoe of Norton was still working near Highland Road approximately 450 feet from the existing driveway.

The evidence establishes that late in the afternoon of October 6th, defendant's construction superintendent decided to have constructed an excavation for the septic tank system, that the temporary field office had already been substantially erected at a distance of 26 feet west of the existing driveway, that Mr. Kenneth C. Olsen, the defendant's superintendent, arranged with Norton to lease his backhoe and crew for the time necessary to make the excavation, that Norton proceeded to make the excavation in accordance with instructions and location designated by Mr. Olson. It is undisputed in the record that the crew making the excavations was at all times under the direction and control of defendant and was acting as its agents and employees. The evidence further indicates that the septic tank excavation was dug along the westerly side of the existing driveway approximately 200 to 300 feet south of Highland Road, that this hole was approximately 6 to 8 feet wide, 10 to 12 feet long and about 7 feet deep, that to the north of the septic tank excavation and forming a part of it was a filter bed trench which was approximately the same width but not so deep, and that this trench ran parallel to the existing highway for a distance of 30 feet. According to Mr. Duffy's testimony, the easterly border of the hole was within inches of the driveway. The evidence also indicates that the plaintiff was completely ignorant of these arrangements, that the continued use of the existing driveway resulted in the driveway being packed down together with the adjacent terrain so that there was no well-defined border to the driveway, that after the Norton crew finished the work for the defendant, the backhoe was re-

turned to its former position as hereinbefore described, that Norton was paid by the defendant for the time used to make these excavations, that at the close of the construction day, Saturday, October 6, 1956, the septic tank hole and adjacent filter bed trench had been completely constructed and was left without any form of barricade or warning lights, and that the fill from the excavation was placed on the westerly side of the trench in the form of a windrow of earth.

The evidence also establishes that Saturday night, October 6, 1956, it rained hard and that mud caused by heavy rain materially affects work of an excavating contractor, necessitating change in the plan and procedure of his work. Plaintiff testified that one of his reasons for going to the premises the day of the accident was to consider the necessity of such change and to make arrangements with his foreman so that the work would proceed smoothly Monday morning. There was testimony that it was not uncommon for excavating and grading contractors to visit the premises after normal working hours in order to determine changes and thereby avoid delay.

Plaintiff also testified that when he arrived on the premises on Sunday, October 7, 1956, the gate across the existing driveway was unlocked and open, that he parked his car near the entrance of the existing driveway and proceeded to walk along the existing driveway in a southerly direction, and that he fell into the septic tank hole, sustaining serious injuries. Plaintiff described the condition of visbility at the time of his arrival as enough natural light, although it was very dull, so that he could see the ground immediately in front of him. He denied seeing the hole at anytime before he fell into it. Plaintiff claimed that he could not distinguish the hole from the surrounding area because all the ground looked the same as the space of which the hole consisted and was indistinguishable in

appearance from the solid ground on which he had been walking, and that there was no barricade or lights around the hole in which he fell, and that he had no previous knowledge of the existence of the hole before he fell into it or any indication that such a hole was to be dug or that it was to be located where it was between the time he visited the premises on Saturday afternoon and Sunday when he returned and the accident occurred.

Plaintiff also testified that excavations, such as a septic tank hole and a filter bed trench, which were temporary excavations, were not part of the construction specifications, and are not customarily barricaded or otherwise protected and that the plans and specifications did not call for excavations in the vicinity of the existing driveway at that particular time .

The defendant denied any duty, custom, or practice to barricade or otherwise guard such excavation as the one in question, thereby creating a question of fact for the jury which was obviously resolved against the defendant.

As a special affirmative defense, the defendant has pleaded that in the subcontract between the plaintiff and defendant there is contained an indemnity provision which reads as follows:

> "(b) The subcontractor shall at all times indemnify and save harmless the Contractor and the Owner on account of any and all claims, damages, losses, litigations, expenses, counsel fees and compensation arising out of injuries (including death) sustained by or alleged to have been sustained by the servants, employees, or agents of the Owner or the Subcontractor or the Contractor, other Subcontractors or material men, and from injuries (including death) sustained by or alleged to have been sustained by the public servants, employees, agents of the public, any or all

persons on or near the work, or by any other person or property, real or personal, caused in whole or in part by the acts or omissions of the Subcontractor, Subcontractor's material men, or any other directly or indirectly employed by them, or any of them, while engaged in the performance of this subcontract. * * *"

It was conceded by both parties to this appeal that the foregoing clause raised a question of law rather than a question of fact for the determination of the jury. The court, upon motion of the plaintiff seasonably filed, thereupon, determined as a matter of law that the foregoing indemnity provision had no application to the facts of the case and eliminated this defense in submitting the cause to the jury.

Plaintiff's petition alleges three specifications of negligence:

"1. In constructing said excavation in close proximity to the customarily used pathway of ingress and egress to and from the premises;

"2. In failing to barricade and provide warning lights and other means of effective warning of the construction and existence of said excavation which it knew to be in close proximity to the usual pathway of ingress and egress.

"3. In constructing and maintaining an unguarded excavation in close proximity to a regular pathway used and known by the defendant to be used for ingress and egress."

To the petition of the plaintiff, the defendant filed its amended answer which denies all allegations of negligence and affirmatively pleads the defenses of contributory negligence and assumption of risk and the indemnity provision of the contract. The trial court struck the affirmative de-

fense of assumption of the risk and the defense of the applicability of the indemnity provision, holding as a matter of law that these issues were not in the case. The affirmative defense of contributory negligence was submitted to the jury as a question of fact along with the claims of negligence set forth by plaintiff.

Defendant complains of error in the record and proceedings prejudicial to its rights in the following assignments of error:

"1. The trial court erred in overruling defendant-appellant's motion for a directed verdict made at the close of plaintiff's evidence and renewed at the close of all the evidence.

"2. The trial court erred in overruling defendant-appellant's motion for judgment notwithstanding the verdict of the jury.

"3. The trial court erred in submitting to the jury the question of whether plaintiff-appellee was an invitee on the premises at the time of the accident, and in failing to hold as a matter of law the plaintiff was a mere licensee.

"4. The trial court erred in striking First Separate Defense which was based upon the indemnity provision contained in plaintiff-appellee's contract with the defendant-appellant.

"5. The trial court erred in refusing to submit to the jury the issue of plaintiff's assumption of risk.

"6. The trial court erred in submitting the issue of defendant-appellant's negligence to the jury.

"7. The trial court erred in submitting the issue of plaintiff-appellee's contributory negligence to the jury.

"8. The verdict and judgment are against the manifest weight of the evidence.

"9. The trial court erred in admiting certain evidence over the objection of defendant-appellant seasonably made.

"10. The trial court erred in giving plaintiff's special request to charge Numbers 2, 3, 4 and 7.

"11. The trial court erred in refusing defendant's special instructions Numbers 8, 9, 10, 11, and 12.

"12. The trial court erred in its general charge to the jury.

"13. Other errors apparent on the face of the record, to the manifest prejudice of defendant-appellant."

If the plaintiff merely enjoyed the status of a licensee upon the premises at the time of his accident, he would have no case. Assignments of error 1, 2, 3, 6 and 7 raise the question of whether the evidence establishes that the plaintiff had a prima facie case for the jury's consideration.

After a careful consideration of all the evidence in the light of the applicable principles of law, we are of the opinion that this case was correctly a case for submission to a jury under a proper charge.

There is a sufficiency of evidence to establish that plaintiff's purpose in being upon the premises was ultimately connected with the proper performance of the subcontract between plaintiff and defendant under the conditions imposed by the defendant upon plaintiff to expedite the work with all due haste. The evidence establishes a direct pecuniary benefit to defendant by such compliance on the part of the plaintiff.

It was for the jury to determine whether it could be foreseen that the plaintiff would have occasion to visit the premises after a heavy rain necessitated a change in his

field plans in order to properly perform the work under his contract. Defendant's agent, Olsen, conceded that heavy mud does affect the work of grading and excavating subcontractors.

There is an abundance of authority that one working under a subcontract visiting construction premises for a proper purpose concerned with the performance of that contract enjoys the status of a business visitor as to the person in general control of the premises. There was no dispute in this case but that the defendant was in general control of the premises. In 39 Ohio Jurisprudence 2d 563, Negligence, Section 51, it is stated:

> "According to the Supreme Court, an 'invitee,' in tort law, means a business visitor, that is, one rightfully on the premises of another for purposes in which the possessor of the premises has a beneficial interest. • • • "

See Scheibel v. Lipton, 156 Ohio St. 308, 102 N.E. 2d 453.

The plaintiff as a subcontractor doing business as an individual proprietor enjoys the same rights as a business visitor. See also McGeary v. Reed, 105 Ohio App. 111, 151 N.E. 2d 789; Joyce v. Union Carbide & Carbon Corp., 114 Ohio App. 51, 173 N.E. 2d 692.

Defendant contends that even if it be conceded that plaintiff was a business visitor and entitled to have defendant exercise the common law duty of ordinary care for his protection, that this duty does not extend to barricading or providing warning lights as to an excavation of the type here involved, well within private property, and that in any event, the facts establish plaintiff's contributory negligence as a matter of law.

We are of the opinion that the common law duty of a possessor of land to business visitors with regard to ex-

cavations adjacent to traveled pathways on private property is applicable to the facts in this case and is stated in 38 American Jurisprudence 790, Negligence, Section 130, as follows:

> "* * * The duty which an owner or an occupant owes to one using a way upon the premises by invitation is such that the owner or occupant cannot make excavations or leave unprotected openings so close to the line of way as to render travel thereon unsafe, without incurring liability to the invitee for injury sustained by him from such dangerous condition. This does not mean, however, that an invitee can hold the owner or occupant liable for an injury received by him while deviating materially from the way covered by the invitation. It does mean that one who leaves a dangerous excavation on his property cannot avoid liability for injury to one who, coming upon the premises on business, is injured by falling into it, on the theory that it was not in the path which he was entitled to travel, if it was so close thereto that he could not transact his business without coming in such proximity to it as to render it perilous to him."

Weigel v. The Cottage Building & Loan Co., 68 Ohio App. 467, 42 N.E. 2d 171, is in accord with this position. See also: Colarossi v. Anderson Concrete Corp., 175 Ohio St. 321, in which the propriety of submitting such a question of fact to a jury was reaffirmed.

We believe an unguarded septic tank hole and filter bed trench, constructed as it was in such close proximity as to be virtually encroaching upon the main ingress and egress route, constituted a dangerous condition, existing on a part of the premises used by persons authorized to use them. It is a fundamental concept of tort law that if the actor's conduct is a substantial factor in bringing about

harm to another, the fact that the actor neither foresaw nor should have foreseen the extent of the harm or the manner in which it occurred does not prevent him from being liable. See Restatement of the Law of Torts 1173, Section 435. The jury could certainly find here that the excavation as it was, on the spur of the moment, constituted a foreseeable risk of harm to defendant's business visitors of which this plaintiff could rightfully be found to be one.

We need not decide whether the question of plaintiff's status was one of law or one of fact inasmuch as the trial judge, under proper instruction, submitted the issue to the jury as a question of fact, and the jury resolved it against the defendant.

Defendant urges that under controlling authorities this court must hold as a matter of law that the plaintiff was chargeable with contributory negligence and, therefore, on that ground alone, the case should have been taken from the jury. Defendant argues that it was too dark for plaintiff to see where he was walking, he obviously had no right to use the pathway, relying on natural light, and if he could see where he was walking, it must be held as a matter of law that the hole into which he fell, in its open, unguarded state, was an obvious hazard to be seen and avoided.

Defendant cites to this court as controlling, the recent decision of Fogle v. Shaffer, 167 Ohio St. 353, 148 N.E. 2d 687, which clearly holds that one who steps into a hole which he could easily have seen if he had looked, cannot recover for injuries that follow. The decision in the Fogle case is based on the fact that the plaintiff was not looking where she was going, but was looking to her rear, talking as she was stepping into premises which she knew were being remodeled. The facts, therefore, are completely distinguisable from the case at bar. Likewise defendant

cites several decisions concerning falls into elevator shafts. See Johnson v. Citizens National Bank of Norwalk, 152 Ohio St. 477, 90 N.E. 2d 145. Careful analysis of the elevator shaft cases leads us to the conclusion that the fundamental premise on which these cases is based is that the plaintiff in stepping forward when he could not clearly see and while stepping into an area which he had no reason to believe or anticipate was safe is himself negligent. This court ruled to the same effect in Helvich v. George A. Rutherford Co., 96 Ohio App. 367, 114 N.E. 2d 514.

The jury, however, was entitled to find from the evidence adduced in the instant case that the plaintiff had reason to believe that the way he was traveling was safe. He was using an authorized pathway. There were no plans known to him for construction anywhere in the vicinity of the pathway. The only persons concerned with the excavation, to the knowledge of the plaintiff, were his own employees and Norton. Norton, however, was busy working some 450 feet away and it would be sometime before Norton's men would be working in the vicinity of the existing driveway. Coupled with the fact that the day before, at the close of the working day, the plaintiff had visited the very place and found no indication and no mention of the proposed excavation. Furthermore, the jury could find from the evidence that when an excavation was made so close to a driveway in such constant use, one would expect to encounter barricades or warning lights about it.

Defendant introduced into evidence numerous photographs of construction projects of plaintiff in other places to establish that none of these trenches, holes, and excavations contained any form of barricades or warning lights even though they were in close proximity to access routes on the job. The plaintiff explained that all of those excavations were constructed pursuant to plan and specifications with which the workingmen concerned with the project

would be expected to be familiar and know of the existence of same. We believe it was for the jury to determine whether the excavation into which plaintiff fell, under the circumstances under which it was constructed, imposed upon the defendant a duty to provide some sort of protection and that lack of such protection could materially affect plaintiff's state of mind as he was proceeding along the pathway. We cannot find as a matter of law that the excavation into which the plaintiff fell was so open, obvious and discernible that the plaintiff as he proceeded without some forewarning of the existence of such excavation would be duty bound to see it. The question of whether this excavation should have been discovered by a man of ordinary prudence, proceeding as plaintiff was under the existing circumstances, is in our opinion, a question of fact for the jury. This issue was submitted under a proper charge by the trial court and was obviously resolved against the defendant.

We are of the opinion that a correct interpretation of the law of contributory negligence applicable to the evidence adduced in this case is set forth in 38 American Jurisprudence 879, Negligence, Section 199, as follows:

> "* * * One who is invited to come upon premises to transact business with the owner or occupant may assume, in the absence of circumstances which indicate or which reasonably should indicate the existence of defects or dangers in the premises, that the premises are safe for the use to be made of them under the invitation. In other words, it is not contributory negligence for an invitee upon premises to fail to look out for danger when there is no reason for an ordinarily prudent person to apprehend a peril."

Ohio authority in accord, see: Weigel v. Cottage Building and Loan Co., supra; McGeary v. Reed, supra. It is inter-

esting to observe that on the facts of the McGeary case, the hazard in question was a cord strewn across the stairway of the premises under construction and that it had been placed there between the time the plaintiff had previously been upon the premises and the time of the accident and was unknown to the plaintiff.

The argument that the accident occurred after normal working hours does not impress us. The nature of the business and the circumstances under which plaintiff was employed, as revealed by the record, justify a finding that plaintiff's presence after so-called normal construction hours was still foreseeable.

The Ohio law on the affirmative defense of assumption of risk is clearly delineated in the case of Ricks v. Jackson, 169 Ohio St. 254, 159 N.E. 2d 225. It was therein held to be prejudicial error to the rights of the plaintiff to submit this issue to the jury, even on a proper charge, where there is no evidence to support the issue. The court further makes it clear that in the absence of evidence that the plaintiff knew of the particular danger, or that the danger was so obvious that he must be taken to have known of it, it cannot be held such a person assumed the risk of injury from the danger presented. For reasons which we have already stated, we are convinced that the record is completely silent on any knowledge of the particular danger by the plaintiff so as to establish that he proceeded forward into an area dangerous to him with full knowledge and appreciation of the hazard presented. There is a difference between assumption of risk and contributory negligence. This difference has been recognized by all authorities on Tort Law. See Miller v. McAllister, 169 Ohio St. 487, 160 N.E. 2d 231.

We, therefore, conclude that assignment of error No. 7 is not well taken since the trial court did not err in submitting the issue of contributory negligence to the jury.

Assignment of error No. 5 is not well taken since the trial court properly determined upon motion that there was no evidence of any finding of assumption of risk on the part of the plaintiff. For reasons already discussed, we conclude that assignments of error Nos. 1, 2 and 3, are not well taken, as this cause, upon its facts, constituted a proper question for the jury on the issues of defendant's negligence and plaintiff's contributory negligence.

We come now to the question—did plaintiff's own contract, containing an indemnity provision, bar him from a right of recovery which otherwise would be available to him under the law? We agree with the contention of both parties that the question is one of law and not of fact for the jury. The real determining question is whether the act of the plaintiff in traversing the existing driveway to inspect the premises for possible emergency field changes in his grading and excavation plan, constituted an "act or omission" on his part while engaged in the performance of his subcontract so as to require plaintiff to indemnify or hold harmless the defendant from damages sustained by the plaintiff. The indemnity provision is part of clause 11 of the subcontract between plaintiff and defendant, and particularly, sub-paragraph (b) of that contract. The entire clause 11 of the contract is under the general heading of "Workmen's Compensation, public liability and property damage." Reading clause 11 as a whole, it obligates the plaintiff, as the subcontractor, to provide insurance and financial guarantees to protect the contractor, defendant herein, from financial loss. This strongly indicates that what was sought was to provide indemnity for the general contractor for any possible vicarious liability or responsibility on its part arising out of acts or omissions of its subcontractor who would be financially protected through insurance.

We are impressed with the reasoning expressed in 11 Ohio Jurisprudence 2d 400, Contracts, Section 156, con-

cerning reasonable construction of contracts which reads as follows:

> "All contracts should receive a reasonable construction in order to carry out the presumed intention of the parties as expressed by the language used. Instruments are not to be construed so as to arrive at absurd or impossible results. If the meaning is doubtful so that the contract is susceptible of two constructions, the interpretation which makes a rational and probable agreement must be preferred. Where a contract is equally subject to several interpretations, one of which presupposes rational action upon the part of all parties thereto and the other irrational action upon the part of one of the parties thereto, courts, in seeking to determine the intention of the parties will assume that the parties entering into the contract were each exercising reason and give to the contract such reasonable construction as it will bear."

We are of the opinion that to construe the contract as contended by the defendant would, in effect, deny the plaintiff any right of recovery for claimed negligence of the defendant, merely by his physical presence upon the property. This does not appear to be the type of rational understanding of the purposes of such a contract as contemplated in the law. It would have been possible for defendant to draft an agreement, accomplishing the purpose for which it contends the instant clause is applicable. The defendant could have inserted into its contract a clause providing that the subcontractor shall at all times indemnify the contractor or hold him harmless on account of any and all damages sustained by any person, including the subcontractor or his employees, while engaged in the performance of the work provided by the subcontractor. We do not believe, however, that the language of "acts

or omissions" is equivalent of saying any work done in the performance of the subcontract.

The very authority cited by the defendant, namely, St. Paul Mercury Indemnity Co. vs. Kopp, 70 Ohio Law Abs. 259, 121 N.E. 2d 23, contains language notably distinguishable from the language of the instant indemnity provision.

Likewise the Federal case of Seaboldt vs. Pennsylvania Railroad Co., 290 Fed. 2d 296, in which an industry was required to indemnify the railroad under a clause somewhat similar to that in the case at bar for its failure to maintain a gate used by the railroad employees and permitting the same to get into a condition of disrepair, is clearly distinguishable from the case at bar. We are of the opinion that a failure to inspect or maintain a gate or other physical property would constitute an "act or omission" just as a failure to barricade or provide warning lights, would, undoubtedly, constitute an "act or omission." But there is nothing in the instant indemnity provision suggesting an attempt by the defendant to exculpate itself from its own negligent "act or omission." We, therefore, conclude that the trial judge was correct in determining as a matter of law that the indemnity provision was not applicable to the facts upon which plaintiff has based his cause of action and, therefore, assignment of error No. 4 is not well taken.

Having concluded, for the reasons stated in this opinion, that the plaintiff had established a case for submission to the jury upon a proper charge of the trial court, we now proceed to examine whether error in the trial asserted by the defendant intervened which was prejudicial to defendant's rights to as to warrant the granting of a new trial.

Assignment of error No. 10 complains of the trial court's giving of plaintiff's special requests to charge before argument numbers 2, 3, 4 and 7. Plaintiff's request No. 2

merely defines the legal duty which defendant as general contractor owed to plaintiff as an independent contractor upon the premises for business purposes. In the light of our analysis of the evidence, clearly, this charge is correct. Special request to charge No. 3 of the plaintiff sets forth guidelines for the jury patterned after an approved instruction in the case of McGeary v. Reed, supra, to determine whether or not contributory negligence of plaintiff was established under the facts in evidence.

The error complained of in this charge by defendant is that it passes onto the jury the opportunity to consider the discernibility of the hole under the excavating conditions in determining whether or not the plaintiff should be found chargeable with contributory negligence. We are of the opinion that this is a fair issue of fact to be considered by the jury in a case such as this, where plaintiff is proceeding along a pathway which he apparently had every reason to believe was safe and authorized for him. This is quite different from proceeding in a darkened passageway, open elevator shaft, or darkened room under construction, where one has no right to proceed on the assumption that the way ahead is safe. As applied to the facts of this case, we, therefore, find no error in giving this charge. Plaintiff's special request to charge No. 4 is a proper charge dealing with guideposts to assessment of damages.

Plaintiff's request to charge No. 7 tells the jury in effect that contributory negligence to exist must amount to not only a want of ordinary care for his own safety on the part of the plaintiff but a proximate casual relationship between such want of care and the injury complained of. It is significant to note that the verdict here was not tested by special interrogatories. Our Supreme Court and Appellate Courts have on many occasions held that even where, as a matter of law, contributory negligence existed,

the jury could still find for the plaintiff because an issue of proximate cause relating that contribtuory negligence to the accident was presented as a question of fact. See Chambers v. McFerren, 168 Ohio St. 398, 155 N.E. 2d 917. We, therefore, find no error prejudicial to the rights of defendant in giving this charge, and therefore, find that assignment of error No. 10 is not well taken.

Assignment of error number 11 relates to claimed error in refusing to give certain special request to charge before argument by defendant, specifically Nos. 8, 9, 10, 11 and 12. Special request No. 8 states to the jury that as a matter of law it was not negligent in failing to barricade or place lights around the excavation within private property. As we have already stated, this is a question of fact for the jury to determine. Special request No. 9 relates purportedly to the purpose of plaintiff in being on the premises and could not help but confuse the jury under the interpretation of law we have placed upon the facts of the case. The test, as we view it, is not whether the plaintiff was primarily on the premises for the purposes of his own benefit and convenience but whether he was on the premises to carry out a purpose incident to the performance of his contract. Defendant's special charge No. 10 tells the jury that a contractor is not negligent in failing to guard such "natural and necessary hazard after the work day is over and the property is closed for ordinary business purposes." Such a charge would, undoubtedly, be applicable to premises having a well defined ordinary business purpose. As applied to the facts of the instant case, however, the charge gives the jury no guide as to what is a "danger and hazard naturally and necessarily created" and there is substantial evidence that the septic tank hole into which plaintiff fell was not such a hazard. Furthermore, the charge does not make the issue of whether the hole in question was a danger and hazard naturally and necessarily created, a fact question for the jury, but purports

to determine it as a matter of law. This charge as well as charge No. 8 of the defendant was allegedly predicated upon the decision of this court in Helvich vs. George A. Rutherford Co., supra. In that case, however, there was no evidence to support any reason to foresee a visitation by anyone coming upon the premises after the close of normal working hours. The facts of the case were concerned with a remodeling of the interior of a leased portion of a building. Plaintiff, as a night watchman, employed by the owner of the building, rather than the lessee, had no business going into the premises in the first place since, as determined by this court as a matter of law, his purpose in being on the premises did not remove him from the status of a mere license. Furthermore, the removal of the balcony railing which created the hazard, injuring Helvich, was clearly a danger and hazard naturally and necessarily created in the performance of the work for it was one of the specified jobs the contractor was hired to do. We cannot, therefore, accept the proposition that the law applicable to Helvich is in any way applicable to plaintiff. Charge No. 11, concerning the encountering of conditions of risk naturally resulting from the performance of the work, is not applicable as stated for reasons already discussed in this opinion.

Defendant's charge No. 12 states the law applicable to the rights only of a bare licensee and not those of business invitees. However, charge No. 12, as promulgated by the defendant, does not tell the jury that the law therein stated should be applied by them only if they find that plaintiff was a bare licensee, and, therefore, in the form presented, the charge was properly refused by the trial court. We, therefore, find no error in assignment of error No. 11.

Assignment of error No. 12 relates to claimed error in the general charge to the jury with particular reference to the charge on the issue of damages. We do not believe

it necessary to discuss this assignment in extended detail since the defendant makes no claim that the verdict is either excessive or the result of passion and prejudice. The serious injuries and disabilities with which the plaintiff is afflicted as shown in the record and are, incidentally, uncontroverted, support the verdict which was rendered. We are of the opinion, in analyzing the charge as a whole, that it was a fair and correct charge upon all issues submitted to the jury. Therefore, this assignment is not well taken.

Assignment of error No. 8 asks us to find that the verdict and judgment are against the manifest weight of the evidence. With regard to this assignment of error, it is probably sufficient to state that there is not a concurrence of three judges who are of the opinion that the case should be reversed on the weight of the evidence. More important, however, it is our opinion that there is ample evidence to support each question of fact tried by the jury in the instant case. Further, under the instructions given the jury by the trial court, the jury could well find that it was the breach of duty of the defendant in its failure to protect plaintiff against a foreseeable risk of harm which was the proximate cause of the serious injuries suffered by the plaintiff in the instant case. We are of the opinion that it is not the function of this court to reweigh the evidence in an attempt to reach a conclusion different from that of the triers of the facts. It is rather the function of this court to search the record to see whether there is sufficient evidence for the triers of the facts, exercising judgment of reasonable men, to come to the conclusion which they did. We conclude there is such a sufficiency of evidence, applying the reasonable man test, to justify the findings by the jury in favor of the plaintiff. We, therefore, find that assignment of error No. 8 is not well taken. See Joyce v. Union Carbide & Carbon Corp., supra.

With regard to assignment of error No. 9, we wish to state that we have examined the bill of exceptions in its

entirety, paying particular attention to the claims of error concerning the reception of evidence by the trial court on cross-examination of defendant's expert witness, Berwin J. Fry. Taking the bill of exceptions as a whole, we feel that the defendant had ample opportunity to introduce into evidence all possible testimony and exhibits setting forth its position, and that no error intervened in the admission or exclusion of evidence to the prejudice of the defendant. We believe that under the substantial justice rule, the defendant had a fair trial and that the judgment ought to be affirmed.

We find no apparent error on the face of the record as suggested by assignment of error No. 13.

For the reasons stated above, it is the opinion of the majority of this court that the judgment herein is not excessive, that it is supported by ample evidence, and that there is no error in the trial of the cause prejudicial to the rights of the appellant. Therefore, the judgment of the court below, entered in favor of the plaintiff, is affirmed. Counsel to prepare a journal entry in conformity with this opinion noting exceptions to defendant.

CORRIGAN, J. CONCURS.
SKEEL, C.J. DISSENTS.

I certify that the foregoing represents a true and complete copy of the majority opinion rendered by this Court in the case of Peter L. Salemi vs. Duffy Construction Corporation.

BARBARA A. STAPLETON
Reporter.
Court of Appeals of Ohio,
Eighth Appellate District.

CORRIGAN, J. (Concurring in judgment)

I concur in the judgment of affirmance. It is my opinion that the plaintiff was a business invitee. In my view, the paramount question presented to us is upon the issue of contributory negligence, and I am also of the opinion that it cannot be said as a matter of law that plaintiff was negligent. He was familiar with the existing driveway and the fact that it was safe in the area on and about the driveway before the excavation, and he had no knowledge that the excavation had been made when he returned at around sunset on the evening of the accident. The light was dim and the outline of the excavation was necessarily obscure. Plaintiff's testimony was that it was almost dark at the time of the accident. Plaintiff's testimony further was that he could not distinguish the hole from the surrounding area "because all that ground looked the same all of the way around." The excavation was, according to some of the testimony, within a few inches of the edge of the existing driveway which he was traversing with confidence to get from the public road to the part of the job site where he was to do work the following day. True, a pathway is not an invitation to leave at any place until its end is reached. But with just a few inches between the safety of the existing driveway and the recently created danger, a slight misstep would have precipitated him into the excavation. Under such circumstances, it is for the jury to say, under a proper charge on contributory negligence, whether a misstep or a deviation of a few inches from the edge of the pathway he had previously traveled constituted a step which a reasonably prudent person would not have taken.

I find no error in the record prejudicial to the substantial rights of the defendant.

• • • • • • • • • •

SKEEL, C.J. (Dissenting)

The facts as stated in the majority opinion should be amplified. The driveway leading into the property near which the defendant dug a filter bed, trench and hole for a septic tank was the driveway constructed by the former owner of the farm. The farmhouse had burned and was left in a dilapidated state. The driveway was not constructed in furtherance of the construction work in progress at the time plaintiff was injured, its location having been determined for the benefit of the owner of the farm and was not a facility constructed for the use of those engaged in the construction work there in progress and, therefore, they were permitted to use it if it suited their convenience.

The relationship between the plaintiff and the defendant was that of general contractor (the defendant) and independent subcontractor (plaintiff). This relationship was created by a contract in which the plaintiff agreed to do certain grading for a unit price. It was the obligation of the plaintiff to do the work agreed upon and of the defendant to pay the unit price under the terms of the contract. The plaintiff's compensation was not concerned with benefits to the defendant in his contract with the owner for a percentage of any amount saved in the construction of the building from the guaranteed maximum nor was a completion date fixed even though both contracts provided that time was of the essence.

On the Saturday before the accident the defendant, as was required of him under his contract with the owner to provide temporary toilet facilities in the temporary field office for the workmen, excavated a trench, a filter bed and hole for a septic tank, the excavation being about forty feet in length, five or six feet wide and varied in depth from seven feet to about three feet. This excavation started at about the place of the temporary field office then being

constructed some three hundred feet from the public highway and paralleling closely the old driveway as above set out. The plaintiff had visited the construction site in the early afternoon of the Saturday preceding the day (Sunday) of the accident. After he left the premises, the defendant dug the necessary hole to provide toilet facilities for the field office as required by defendant's contract with General Electric.

The plaintiff again visited the construction site late Sunday afternoon, giving as his reason that there had been heavy rains Saturday night and Sunday morning which might have required him to reschedule his work plans for the following Monday morning. He arrived at the construction site about 6:00 P.M. It was getting dark. Sunset was at 5:59 P.M. His testimony as to his ability to see where he was going is in considerable confusion. He testified that he did not see the hole before he fell into it after saying that it was "almost dark" and in explaining his ability to see the driveway, stated that because of the lumps of clay and ruts on and in the driveway, "I was careful as I walked." He also testified that he could not distinguish the hole from the surrounding area because all of the ground looked the same. Certainly, if the plaintiff could not clearly state the condition of the light or of his ability to see the surroundings at the time of the accident, the jury should not have been permitted to guess about the conditions. If it were sufficiently light to see where he was going or if it were dark so that he could not proceed safely, then in either event, his failure to use ordinary care would be the proximate cause of his injuries. At least he did not see an excavation forty feet long and five feet wide, varying in depth from three to seven feet, however, he did observe that the dirt taken out of the excavation had been piled to the west of the excavation. Certainly, its presence indicated that something had been done after he left the construction site early Saturday afternoon.

Plaintiff's visit late Sunday afternoon was for his own purpose. He was in no sense a business visitor. He could not have expected to find anybody (defendant or otherwise) on the construction site on a Sunday afternoon or early evening. As said by the Supreme Court in paragraph one of the syllabus in the case of Scheibel v. Lipton, 156 Ohio St. 308, 102 N.E. 2d 453:

> "In tort law an 'invitee' means a business visitor, that is, one rightfully on the premises of another for purposes in which the possessor of the premises has a beneficial interest. A social guest is not a business visitor and is not an 'invitee' as that term is used in tort law."

Under the circumstances of this case, it is undisputed that the plaintiff was visiting a construction site where work was in progress in the construction of a building. It is a matter of common knowledge that as work progresses on a construction site, hazards necessary to accomplishing the purposes intended will be created, and those who go on such premises must accept such dangers and use care to avoid them as such circumstances require. The plaintiff was a grading contractor and was completely familiar with such matters.

In the case of Schwarz v. The General Electric Realty Corp., 163 Ohio St. 354, 126 N.E. 2d 906, the Supreme Court said in the first paragraph of the syllabus:

> "Where an owner of premises engages an independent contractor to do work thereon an employee of the contractor, while performing the work, is on the premises impliedly as an invitee of the owner and the owner owes the employee the duty of exercising ordinary care to maintain the premises in a reasonably safe condition for use, this duty not extending, how-

ever, to any inherent hazards necessarily present because of the character of the work to be done."

If plaintiff had visited the construction site during business hours, the progress in preparing for a septic tank, as required of defendant by defendant's contract, would have been obvious. The defendant owed no duty to guard against a danger necessarily created under defendant's contract to construct a building, and his failure to barricade the septic tank hole located well within the construction area and three hundred feet from the public highway was not negligence as a matter of law.

For the foregoing reasons, the judgment should be reversed and final judgment entered for the defendant.

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In the Supreme Court of the United States

OCTOBER TERM, 1965.

No. 926.

PETER L. SALEMI,

Petitioner,

v.

DUFFY CONSTRUCTION CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO.

BRIEF IN OPPOSITION.

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

This is a tort case involving only local law. Petitioner, the earth moving sub-contractor for a construction project, sought compensation for injuries incurred when, while within such construction project, he walked into an open pit approximately 6 feet wide, 40 feet long, and varying from 3 to 7 feet in depth. He did this at approximately 6:00 P.M. on Sunday, October 7, 1956, when the project was closed down for the Sabbath. He was not required to be there, and no one expected him. No one else was there. Petitioner had walked alongside at least 30 feet of the 40 foot length of the gulf before he tumbled into it. The pit was 200 feet from any public way.

Petitioner's subcontract said not one word concerning his right to enter the premises, as he concedes (Petition, pp. 76, 77).

At no time in this litigation until after the Supreme Court of Ohio rendered its judgment did Petitioner rely upon (1) any constitutional provision or (2) any statute (point (2) being conceded. Petition, p. 102).

Petitioner sued for negligence. His contract was not germane. It gave him no authority to enter the premises at other than business hours. Petitioner points to no such language in it.

The Supreme Court of Ohio held that Petitioner had no claim because he was a licensee rather than a business visitor. Petitioner urged the court below that his contract gave him the right of entry at all times, thus seeking to imply into the contract a provision not there.

Although Petitioner urges that the court below overruled prior decisions, even the dissenting Opinion below could not point to one prior decision which had been overruled. None was, as Petitioner all but stipulates (Petition, pp. 20, 97).

From this false premise Petitioner argues that this Court should overrule a long line of decisions, and hold that an alleged departure by a State court from earlier decisions construing isolated contracts contravenes Article I, § 10.

There is no merit in the argument. It cannot even be presented on this record.

But assuming that the decision below did overrule prior law, Petitioner would have this Court disregard *stare decisis* and overrule its own intrenched precedents (Petition, p. 57) while holding it unconstitutional to afford a like privilege below.

Jurisdiction rests on 28 U. S. C. § 1257(3).

No treaty or statute of the United States is involved, nor is any State statute "drawn in question on the ground of it being repugnant to the Constitution * * *."

Nor was there any claim of "* * * title, right, privilege or immunity * * * specially set up or claimed under the Constitution * * *," until presented to the Supreme Court of Ohio on application for rehearing. Then Petitioner claimed *only* that a decision against him offended the contract clause. This comes too late. *Radio Station WOW v. Johnson* (1945), 326 U. S. 120, 128, 65 S. Ct. 1475.

If there be jurisdiction here, there will be jurisdiction every time a State court refuses to conform a contract to the wish of the litigant.

No federal question can be tortured from the record. None was hinted *in limine*. The Ohio court applied settled Ohio law. The conditions of 28 U. S. C. 1257(3) are absent.

Respectfully submitted,

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SMITH WARDER,
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Counsel for Respondent.

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On Petition for a Writ of Certiorari to the Supreme Court of Ohio

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REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Respondent alleges in the first line of the Brief in Opposition, hereinafter referred to as the Brief, that "This is a tort case involving *only local law.*" (Emphasis added). If a state court transcends constitutional requirements in a tort case, it is, of course, no answer to contend that the unconstitutional decision was rendered in a tort case. Does respondent mean to imply that the U. S. Constitution is not part of "local law" that the Ohio Supreme Court must also apply? Therefore, the only issue is whether, as contended in the Petition for a Writ of Certiorari, hereinafter referred

to as the Petition, that court has violated the U. S. Constitution.

On page 1 of the Brief respondent also states that the contract between petitioner and respondent did not say "one word concerning his right to enter the premises" and, on page 2, that the contract "gave him no authority to enter the premises at other than business hours. Petitioner points to no such language in it." Unfortunately, like the Supreme Court of Ohio, respondent states what, with all due respect to him, is only a half-truth. What he should have said is that the contract neither expressly authorized nor prohibited entry into the premises. It would be repetitious, although germane, to mention, with respect to this point, the arguments advanced in the Petition. See Statement of Facts, p. 15, and Argument, pp. 76-85.

Respondent alleges that the dissenting opinion did not point to a prior decision which had been overruled but a reading of the dissent would show the opposite. And respondent fails to make any comment as to the prior Ohio decisions referred to in the Petition and particularly on pp. 85-88 and 104, 105. The question of the Contract Clause is met by a pontifical statement that "There is no merit in the argument," (Brief, p. 2). No cases are cited in support of this contention. The numerous cases cited in the Petition are not analyzed, are not commented upon; nor is there any other cogent or persuasive contention made in support of the dogmatic statement that there is "no merit in the argument."

On page 2 of the Brief, respondent states that "assuming that the decision below did overrule prior law, Petitioner would have this Court disregard *stare decisis*

and overrule its own intrenched precedents (Petition, p. 57)." Many other points besides the *stare decisis* were mentioned in support of petitioner's position regarding the question of the violation of the Contract Clause by the Supreme Court of Ohio. See Petition, pp. 21-56. None of them is met or even commented upon by respondent. Furthermore, respondent fails to consider the issues with respect to the Contract Clause which do not involve overruling of prior law and which are mentioned in points II, III and IV of the Petition, pp. 62-109.

Respondent fails to make any comments regarding points V to VIII of the Petition, pp. 109-126. *They do not relate to the Contract Clause.* Point VII, for instance, is to the effect that the Supreme Court of Ohio, by invading the functions of the jury, denied to petitioner his rights under Amendment VII to the Constitution of the United States as well as under the common law. In vain does one seek even a word of refutation of this point which *alone,* if decided in favor of the petitioner by this Court, would justify reversal of the judgment of the court below.

Petitioner is also constrained to observe that respondent's failure to deny the former association of the Chief Justice of the Supreme Court of Ohio with the law firm that successfully represented the respondent before that court confirms petitioner's allegation of such association.

Finally, on page 2 of the Brief responden states:

> "At no time in this litigation until after the Supreme Court of Ohio rendered its judgment did Petitioner rely upon (1) any constitutional provision or (2) any statute (point (2) being conceded. Petition, p. 102)."

Respondent also alleged (Brief, p. 3) that it "comes too late" for petitioner to have raised in the application to the Supreme Court of Ohio for rehearing the issue that its "decision against him offended the contract clause." In addition to the argument in the Petition, pp. 102-105, it may be noted that the only case cited by respondent in support of this contention, *Radio Station WOW* v. *Johnson,* 326 U.S. 120, 128, 65 S.Ct. 1475, 1480 (1945), is not pertinent. The above-mentioned issue did not arise and could not obviously have arisen prior to the court's rendering the decision itself. After that decision the Motion for Rehearing was the earliest opportunity to present the aforesaid issue to the Supreme Court of Ohio. The motion was made pursuant to Rule IX of the Rules of Practice of that court. See Petition, p. 6.

Let us take an example—not even alluded to by respondent—of the obvious impossibility of raising a pertinent constitutional issue prior to the state court's decision. Point VII of the said Petition (p. 117) is to the effect that the Supreme Court of Ohio, *by its decision,* invaded the functions of the jury. Evidently no such issue could arise until it is mirrored in the decision itself. Not until that decision was rendered could there be raised the issue whether the decision transcends the constitutional requirements relied upon in the Petition.

Radio Station WOW, supra, cites (326 U.S. at 128, 65 S.Ct. at 1480) three cases on the question of raising an issue on a petition for rehearing presented to the highest state court:

> "*Simmerman* v. *Nebraska,* 116 U.S. 54, 6 S.Ct. 333, 29 L.Ed. 535; *Godchaux Co.* v. *Estopinal,* 251 U.S. 179, 40 S.Ct. 116, 64 L.Ed. 213; *American Surety Co.* v. *Baldwin,* 287 U.S. 156, 53 S.Ct. 98, 77 L.Ed. 231, 86 A.L.R. 298."

Although these cases were not cited by the respondent, it may save the time of this Court to analyze them briefly in order to show their inapplicability in the case *sub judice.* In *Simmerman, supra,* no federal question was presented for consideration in the lower court. In the present case, as stated above, the questions presented to this Court could not have even been in existence prior to the decision of the Supreme Court. Both the trial court and the Court of Appeals had rendered opinions in favor of the petitioner and had held that he was performing duties under the contract at the time of his injury. There could, therefore, arise no issue of the violation of the Contract Clause as a result of those two decisions. It was only when the Supreme Court of Ohio held the opposite and thereby impaired the obligation of the contract of the petitioner that the issue of the violation of the Contract Clause of the U. S. Constitution could be raised and was raised on motion for rehearing before the highest state court.

In *Godchaux Co., supra,* the question of the validity of a state constitutional amendment because of conflict with the federal constitution could have obviously been raised earlier than the decision of the highest state court.

In *American Surety Co., supra,* the Court decided that there was ample opportunity prior to the decision of the highest state court to present the objection under the Fourteenth Amendment. There was no such opportunity in the instant case prior to the decision of the Supreme Court of Ohio.

The question whether there has been a waiver of a constitutional right is determined in each case on a

view of the particular rights asserted and denied. *U. S.* v. *Nudelman,* 104 F.2d 549, (1939), certiorari denied, *Nudelman* v. *U. S.,* 308 U.S. 589, 60 S.Ct. 115 (1939). In this connection, it may also be stated that it was held that the issue whether a statute under which a state taxed personal property outside the state violates the federal constitution could be considered, although first raised in a petition for rehearing. *Trust Co. of Norfolk* v. *Commonwealth,* 145 S.E. 326, 151 Va. 883 (1928), reversed on other grounds under the name *Safe Deposit and Trust Co.* v. *Commonwealth of Va.,* 280 U.S. 83, 50 S.Ct. 59 (1929).

Respectfully submitted,

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PETITION FOR REHEARING OF THE ORDER DENYING PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

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Petitioner, Peter L. Salemi, respectfully prays that, pursuant to paragraph 2 of Rule 58 of the Revised Rules of this Court, a rehearing be granted of its order, entered in this case on February 28, 1966, denying the petition for a writ of certiorari to the Supreme Court of Ohio.

The petitioner respectfully shows as follows:

1. The following substantial ground was not presented in the aforesaid petition:

The Supreme Court of Ohio denied to petitioner constitutional due process by its action referred to in Point VII of the petition, page 117.

For convenient reference this point is attached hereto as Appendix A.

Under a contract between petitioner and respondent, the former, as subcontractor for the latter, the general contractor, undertook to excavate a construction site in the general control of respondent. While within the said site, petitioner was injured as a result of respondent's negligence. The question of fact whether petitioner was there at that time for respondent's benefit in the performance of the subcontract was submitted to the jury in view of probative evidence. The jury's affirmative answer on this question was approved by the trial court and by the intermediate appellate court. As a consequence of the jury's answer, both courts held that petitioner was an invitee and as such entitled to compensation.

The Supreme Court of Ohio reversed the lower court on the sole ground that petitioner was not an invitee but a licensee and that as such he could not recover. The basis for the reversal was that petitioner was there for his own benefit and not for that of respondent, a finding of fact contrary to the jury's finding on that issue. In the light of the existence of probative evidence, it is respectfully submitted that the Ohio Supreme Court's going behind the jury's finding on a question of fact constitutes a denial of the due process required by the U. S. Constitution.

Due process as applied to judicial proceedings envisages application of those rules and practice which have been established in our law for the protection of

private rights. Endicott-Johnson Corp. v. *Encyclopedia Press,* 266 U.S. 285, 288 (1924); *Pennoyer* v. *Neff,* 95 U.S. 714, 733 (1878).

> "The words 'due process of law,' when applied to judicial proceedings, 'mean a course of legal proceedings according to those rules and principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights.'" *Endicott-Johnson Corp.* v. *Smith,* 45 S.Ct. 61, 62 (1924).

Thus, cross-examination is one of the rules which is established in our law. Is the denial of the right of cross-examination a denial of the due process of law? An affirmative answer to this question was given in *Derewecki* v. *Pa. R. Co.,* 353 F. 2d 436 (1965).

Lest it be contended in connection with this point of due process that the case *sub judice* involves local Ohio law, it is pertinent to note that so did many of the cases cited in the petition for a writ of certiorari, but this fact did not prevent this Court from not only considering them but also reversing the judgment of the court below, *e.g., Butz* v. *Muscatine,* 8 Wall. 575 (1869), petition, p. 24 *et seq.*

2. Another point is that, with respect to a constitutional issue, the supervisory power of this Court to prevent diversity of decisions on such issues cannot be denied. This case involves a constitutional issue of great importance in the administration of justice as to which state courts—in the case *sub judice* the Supreme Court of Ohio—and federal courts of appeal are in conflict concerning the question whether an appellate court may, consistently with due process, reweigh a question of fact submitted to the jury by the trial judge and decide this factual question contrary to the jury's

finding. This is what was done by the highest court of Ohio in this case. On the other hand, the U. S. Court of Appeals, Eighth Circuit, again a court the decision of which can be reviewed only by this Court, held:

> "We must take that view of the evidence that tends to support the prevailing party, and must accept as established all reasonable inferences to be derived from such testimony. Jaben v. U. S., 349 F. 2d 913 (8th Cir., 1965)." *Babb* v. *U. S.*, 351 F. 2d 863, 866 (1965).

The "prevailing party" in both the lower Ohio courts was the petitioner. Not only did the said Supreme Court fail to "take that view of the evidence that tends to support the prevailing party" but it went so far as to deny due process by redeciding a question of fact contrary to the decision of the jury to which the trial judge had submitted the question of fact.

Conclusion

For the reasons set forth, petitioner prays that a rehearing should be granted in this case.

Respectfully submitted,

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Certificate of Counsel

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the rules of this Court.

Bearing in mind the requirements in Rule 23.4 and the heavy burden of responsibility of this Court, I also wish to express my deep appreciation and gratitude for the Court's indulgence in connection with the petition for a writ of certiorari which, in an endeavor to attain adequacy, may have imposed on the Court reading beyond the periphery of accommodation envisaged by another requirement in the said rule, brevity.

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APPENDIX A

VII. The Supreme Court of Ohio, by invading the functions of the jury, denied to petitioner his rights under Amendment VII to the Constitution, as well as under the common law, to have a fact tried by a jury, where the question of fact, whether the petitioner's visit to the construction site was for a purpose incident to the performance of the contract between petitioner and respondent and for the benefit of respondent, had been submitted as a fact to the jury in view of the existence of probative evidence and where the Supreme Court of Ohio undertook to reweigh the evidence concerning this issue of fact and made a finding contrary to that of the jury on this issue.

The question of fact whether petitioner made the Sunday visit to the construction site for a purpose incident to the performance of the contract between him and respondent and for the benefit of respondent was submitted to the jury. This question was tried by the jury and was answered in the affirmative. As shown by the record evidence in the Statement of Facts, *supra,* and in point III, *supra,* there was probative evidence to go to the jury. It is not necessary to support this point by a contention on the part of petitioner that the evidence on this issue was sufficient to justify the trial judge to find, as a matter of law, in favor of petitioner on this point. Petitioner, however, does believe that the evidence on this point was so overwhelming in his favor that it would have justified such a finding by the trial judge and that the respondent got the better of it in this case by having this issue submitted to the jury as a question of fact. The trial court approved the verdict and consequently the finding of the jury on this issue.

The Court of Appeals found, "After a careful consideration of all the evidence in the light of the applicable principles of law" that "There is a sufficiency of evidence to establish that plaintiff's [petitioner's] *purpose in being upon the premises* [on his Sunday trip] *was ultimately connected with the proper performance of the subcontract be-*

tween plaintiff and defendant [respondent]" and also that *"The evidence establishes a direct pecuniary benefit to defendant by such compliance on the part of the plaintiff,"* 197 N.E. 2d at 403, and *infra,* p. 20a. (Emphasis supplied).

The *majority* arrived at the conclusion that petitioner's Sunday visit was not for the benefit of the respondent by *weighing evidence concerning a disputed question of fact which the jury had decided in favor of petitioner and in regard to which there was probative evidence.* The majority compounded this prejudical and reversible error and the concomitant unconstitutional infringement thereby of petitioner's right of trial by jury by laborious contentions which ignore the substantial body of record evidence mentioned in the Statement of Facts, *supra,* and in point III, *supra,* evidence which entitled the jury to find a definite business advantage to respondent by the presence of petitioner on Sunday at the time and place of his injury. And again, on the point of benefit to respondent, the majority further compounded its unconstitutional invasion of the functions of the jury by, as the minority called them, *"factual contentions"* which are *"disputed by the record"* (Emphasis supplied). This most germane statement was immediately preceded by the following cogent and persuasive observation: "It appears that the opinion of the majority is somewhat in the nature of an argument upon the facts. This court does not ordinarily weigh the evidence." 3 Oh. St. at 175 and *infra,* p. 8a.

In view of the plethora of evidence of fact mentioned in the Statement of Facts, *supra* and in point III, *supra,* and of the findings of the jury that Petitioner's visit to the construction site was for a purpose incident to the performance of the contract between him and the respondent, it is respectfully submitted that this Court should hold that the Ohio Supreme Court exceeded permissible limits of appellate functions and invaded the province of the jury by its re-examining the facts submitted to

the jury and disagreeing with the jury's factual findings on this issue in favor of petitioner. The Court of Appeals stated "there is ample evidence to support each question of fact tried by the jury in the instant case. 197 N.E. 2d at 409 and *infra,* p. 33a.

In *Slocum* v. *New York Life Insurance Co.,* 228 U.S. 364, 33 S. Ct. 523 (1913), this Court held that the U.S. Circuit Court of Appeals, Third Circuit, had no authority, after a verdict, to *determine the facts submitted to the jury* and enter a judgment *non obstante verdicto.* The Court stated:

> "But, instead of ordering a new trial, as was required at common law, *the circuit court of appeals itself re-examined the issues, resolved them* in favor of the defendant, and directed judgment accordingly. This, we hold, could not be done consistently with the 7th Amendment, which not only *preserves the common-law right of trial by jury, but expressly forbids that issues of fact settled by such a trial shall re-examined otherwise than 'according to the rules of the common law'."* 228 U.S. at 399, 33 S. Ct. at 537 (Emphasis supplied.)

Attention may also be called to that part of the statement just quoted that Amendment VII "preserves the common-law right of trial by jury." And there is no need to cite authorities in support of the proposition that, at common law, questions of fact are for the jury.

The rule in *Slocum,* was followed by this Court in *Martha S. Young* v. *Central Railroad Co. of N.J.,* 232 U.S. 602, 34 S. Ct. 451 (1914).

At common law the only means to re-examine questions of fact tried by jury are by granting a new trial or a *venire facias de novo. Parsons* v. *Bedford,* 3 Pet. 433, 447 (1830).

In *Dennis* v. *The Denver & Rio Grande Western Railroad Co.,* 375 U.S. 208, 84 S. Ct. 291 (1963), a lower state court in Utah rendered judgment for the plaintiff in a suit under

the Federal Employees' Liability Act, 45 U.S.C.A. § 51 *et seq.*, hereinafter referred to as the F.E.L.A. On appeal by the defendant, the Supreme Court of Utah vacated the jury verdict and ordered the entry of judgment for the defendant. On certiorari, this Court held that, where plaintiff's evidence, though vigorously disputed, was sufficient to support the jury's conclusion that defendant's negligence contributed to the injury, *the appellate court's function was exhausted, and it could not properly substitute its judgment for that of the jury* and decide that it was the plaintiff's own conduct that resulted in his injury.

The Court said:

> "But in FELA cases this Court has repeatedly held that where 'there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever the facts are inconsistent with its conclusion.' Lavender v. Kurn, supra, 327 U.S., at 653, 66 S. Ct. at 744, 90 L. Ed. 916. 'Only *when there is a complete absence of probative facts* to support the conclusion reached [by the jury] does a reversible error appear.' Ibid." 375 U.S. at 210, 84 S. Ct. at 293 (Emphasis supplied).

With respect to the underscored part in the statement just quoted, can anyone examining the record evidence in the Statement of Facts, *supra,* and in point III, *supra,* seriously contend that in the case at bar "there is a complete absence of probative facts to support the conclusion reached [by the jury]" that petitioner's Sunday visit was for the benefit of respondent and for a purpose incident to the performance of the contract between petitioner and respondent?

In *Dennis, supra,* the Court held:

> "In this case, petitioner's evidence, though *vigorously disputed,* was sufficient to support the jury's conclusion that respondent's negligence contributed to the injury. Hence, '*the appellate court's function* [*was*] *exhausted,* Lavender v. Kurn, supra, 327 U.S., at 653,

66 S. Ct. at 744, 90 L. Ed. 916, and it could not properly substitute its judgment for that of the jury and decide, as the Supreme Court of Utah did here, that 'it seems quite inescapable that it was [petitioner's] own conduct * * * that resulted in this regrettable injury.' 13 Utah 2d, at 255, 372 P. 2d. at 7." 375 U.S. at 210, 84 S. Ct. at 293. (Emphasis supplied).

The case referred to in the statement just quoted, *Lavender* v. *Kurn,* 327 U.S. 645, 66 S. Ct. 740 (1946), was an action under the F.E.L.A., *supra.* This Court held that in a suit for the death of a railroad switch tender, where there was basis in evidence for inferring that a mail hook switch from the side of a mail car struck the deceased and the jury made that inference, *the factual dispute on this point could not be relitigated in the reviewing court* and the fact that there was evidence tending to show that it was *physically and mathematically impossible* for the hook to strike the deceased and showing facts from which it might reasonably be inferred that the deceased was *murdered* was *irrelevant* on appeal.

In connection with the F.E.L.A., a question arises whether an employee was, at the time receiving an injury sued for, engaging in interstate commerce. Where the facts are in dispute or more than one inference can be drawn from them the question is for the jury. Twenty-two cases in support of this rule are cited in Note 1248 of 45 U.S.C.A. § 51, including the 1965 Annual Pocket Part. If the complexity of the issues whether one is engaged in interstate commerce in the myriads of situations that might be involved therein can be left to the jury, *a fortiori* the comparatively simpler question of fact whether petitioner's Sunday visit was for the benefit of the respondent and for a purpose incident to the performance of the contract between petitioner and respondent was properly left to the jury's decision in view of the existence of probative evidence on this point.

No case has been found in which this Court has held that the aforesaid F.E.L.A. rule regarding the determination of a question of fact by the jury is not applicable to other cases than those arising under the Act or has made a distinction between negligence under that Act and negligence in other cases so far as the right of trial by jury is concerned. As a matter of fact, as stated in *Slocum, supra,* p. 119, Amendment VII "preserves the common-law right of trial by jury.

That the interpretation of F.E.L.A., so far as the role of the jury is concerned, is not restricted to that Act, but may be applied in other cases is also known by *Continental Ore Co., et al.* v. *Union Carbide & Carbon Corporation, et al.,* 370 U.S. 690, 82 S. Ct. 1404 (1962). This was a private treble damage action under antitrust laws in which a judgment for the defendant was affirmed by the U.S. Court of Appeals, Ninth Circuit. In reversing the judgment of the lower court, this Court held that the lower court was wrong in taking the case away from the jury and not leaving it to the jury to decide whether the plaintiff partnership, engaged in the production and distribution of vanadium, was damaged by alleged monopolistic elimination of its independent suppliers by defendants, who were engaged in mining vanadium ore, processing vanadium and selling its products, whether the defendants refused to deal with the partnership and whether the partnership failed to take advantage of independent sources of supplies. On the basis of the F.E.L.A. rule concerning the role of the jury, this Court stated:

> "Undoubtedly, *all of the evidence* during this period *does not point in one direction* and *different inferences might reasonably be drawn from it.* There was, however, sufficient evidence to go to the jury and it is the jury which 'weighs the contradictory evidence and inferences' and draws 'the ultimate conclusion as to the facts.' Tennant v. Peoria & P.U.R. Co., 321 U.S. 29, 35, 64 S. Ct. 409, 412, 88 L. Ed. 520." 370 U.S. at 700, 82 S. Ct. at 1411. (Emphasis supplied).

The *Tennant* case, just cited, is an F.E.L.A. case and shows that the interpretation of that Act, so far as the role of the jury is concerned, is not restricted to that Act but may be applied in other cases. In *Tennant*, this Court held that, where an inference drawn by the jury that the railroad's negligence was the cause of the fatal accident to an employee had support in the evidence, an order for judgment for the railroad notwithstanding the verdict would be improper *as depriving the plaintiff of the right to a jury trial.*

The Court stated:

> "Courts are not free to reweigh the evidence and set aside the jury verdict merely because *the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable.*
>
> "[9] Upon an examination of the record we cannot say that the inference drawn by this jury that respondent's negligence caused the fatal accident is without support in the evidence. Thus *to enter a judgment* for respondent *notwithstanding the verdict* is to *deprive petitioner of the right to a jury trial.* No reason is apparent why we should *abdicate* our *duty to protect and guard that right in this case.*" 321 U.S. at 35, 64 S. Ct. at 412 (Emphasis supplied).

It is respectfully submitted that this Court should reverse the judgment of the Supreme Court of Ohio, if for no other reason because that court, in the language of the statement just quoted, was "not free to reweigh the evidence and set aside the jury verdict" and thereby "to deprive petitioner of the right to a jury trial." On the issue whether petitioner's Sunday visit was for the benefit of respondent and for a purpose incident to the performance of the contract between him and petitioner, this rule as to the role of the jury is especially applicable in this case in view of the fact that the jury had already found for the petitioner on that issue and of the further fact that there was probative evidence on that issue.